IN THE SUPREME COURT OF THE UNITED STATES

No. 76-1168

STATE OF ARIZONA,
RICHARD BOYKIN, SHERIFF,
PIMA COUNTY, ARIZONA

Petitioner,

v.

GEORGE WASHINGTON, JR.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
Ninth Circuit

PETITIONER'S BRIEF

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October Term, 1977

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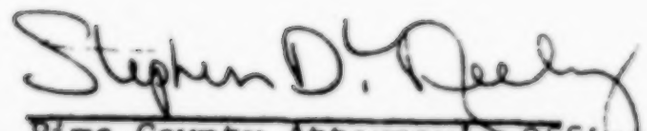
NOTICE OF APPEARANCE

The Clerk will enter my appearance as Counsel for the Petitioner.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY



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REFERENCES IN PETITIONER'S BRIEF

For the convenience of the United States Supreme Court and the Respondent George Washington, Jr., the State of Arizona has employed the following ellipses and abbreviations in its Brief:

(a) The Petitioner, the State of Arizona and Richard Boykin, Sheriff, will be referred to as "The State";

(b) The Respondent, George Washington, Jr., will be referred to as "Washington";

(c) The Honorable Alice Truman, Superior Court Judge for the County of Pima, Arizona, who granted Washington's Motion for a new trial two years following the conclusion of his first trial, and denied his Motion to Dismiss thereafter, will be referred to as "Judge Truman";

(d) The Honorable Robert B. Buchanan, Superior Court Judge for the County of Pima, Arizona, who declared a mistrial in Washington's second trial, will be referenced as "Judge Buchanan";

(e) The Honorable James A. Walsh, United States District Court Judge for the District of Arizona, who granted Washington's Writ of Habeas Corpus on grounds of double jeopardy, will be referenced as "Judge Walsh";

(f) The Superior Court in and for the State of Arizona, where Washington was tried for murder will be respectfully referred to as "The Superior Court";

(g) The United States District Court for the District of Arizona will be respectfully referred to as "the District Court";

(h) The United States Court of Appeals for the Ninth Circuit will be respectfully referred to as "the Ninth Circuit";

(i) The United States Supreme Court will be respectfully referred to as "the Supreme Court";

(j) All references made to matters contained in the Appendix, as printed and lodged with this Court in accordance with U.S. Sup. Ct. Rule 36, as amended, 28 U.S.C.A., will be designated by the abbreviation "App." and the page number thereof will immediately follow;

(k) All references made to matters contained in the certified record of the proceeding in the Ninth Circuit will be designated by the abbreviation "D.C.Rec." and the page number thereof will immediately follow;

(l) All references made to the Superior Court Transcript of the Jury Trial of January 8, 1975, Mr. Bolding's Voir Dire of the Jury Panel, referred to in Washington's Opposition to the State's Petition for Writ of Certiorari, and in the State's Reply Brief, which Transcript was lodged with the Supreme Court on or about May 26, 1977 as an attachment to the State's Reply Brief, will be designated as Exhibit 1, and will be abbreviated to "Exh.1." and the page and line number(s) thereof will immediately follow;

(m) The Arizona Supreme Court Memorandum Decision, filed June 20, 1974, which affirmed the decision of Judge Truman granting Washington a new trial, will be referred to as the "Memorandum Decision";

(n) The Opinion issued on December 3, 1976, and amended January 20, 1977, by the United States Court of Appeals for the Ninth Circuit, affirming Judge Walsh's order granting Washington a Writ of Habeas Corpus, will be referred to as the "Ninth Circuit Opinion";

(o) Unless otherwise stated, all citations and references herein will conform to the uniform system of citation.

INDEX TO ORDERS AND
OPINION OF THE COURTS BELOW

JURISDICTIONAL STATEMENT

The United States Supreme Court has jurisdiction to decide the legal issues of this case by virtue of 28 U.S.C.A. §1254 which provides, in pertinent part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of Certiorari granted upon the Petition of any party to any civil or criminal case, before or after rendition of judgment or decree....

This case was appealed by the State to the United States Court of Appeals for the Ninth Circuit, from judgment of the United States District Court for the District of Arizona, entered October 17, 1975, granting Washington a writ of habeas corpus. Judgment in the form of an opinion by the United States Court of Appeals for the Ninth Circuit was entered December 3, 1976, affirming the district court ruling. A petition for rehearing was timely filed by the State on December 17, 1976. An

order denying the petition for rehearing, but amending the original majority opinion, was entered January 20, 1977. The State of Arizona timely filed a petition for writ of certiorari with the United States Supreme Court on February 23, 1977. On April 18, 1977, the Supreme Court granted the State's petition for a writ of certiorari.

RELEVANT CONSTITUTIONAL PROVISIONS AND ARIZONA RULES

1. U. S. Const. amend. V states that:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation (emphasis added).

2. U. S. Const. amend. VI states that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence" (emphasis added).

3. 17 A.R.S. (unrevised) Rules of Criminal Procedure, rule 314, provides:

> "When a new trial is granted, the new trial shall proceed in all respects as if no former trial had been had. On the new trial the defendant may be convicted

of any offense charged in the indictment or information regardless of the verdict or finding on the former trial. The former verdict or finding shall not be used or referred to in evidence or argument on the new trial."

4. 17A A.R.S. Sup. Ct. Rules, rule 48(c) provides:

"(c) Dispositions as Precedent. Memoranda decisions shall not be regarded as precedent nor cited in any court except for the purpose of establishing the defense of res judicata, collateral estoppel or the law of the case" (emphasis added).

Udall, Arizona Law of Evidence, § 111 at 201 (1960):

"The first block of evidence ruled out is that which has no bearing on the matters in dispute in the trial, and therefore cannot aid the trier of fact."

5. Constitution of the State of Arizona, Art. 2, §23 (as amended 1972):

"The right of trial by jury shall remain inviolate. Juries in criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons. In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict. In all other cases, the number of jurors, not less than six, and the number required to render a verdict, shall be specified by law."

QUESTIONS PRESENTED FOR REVIEW

1. In determining whether or not a state trial judge has abused his judicial discretion in declaring a mistrial, should not the reviewing court look to the whole record of the trial, and to all the circumstances, arguments and events presented to and observed by the trial judge prior to his declaration, rather than solely to the specific findings and statements made by the trial judge in connection with his mistrial declaration?

2. When a state trial judge declares a mistrial because of the possibility of jury prejudice, and state law does not require that findings be made, is the trial judge required by the United States Constitution or by federal case law to make a specific finding of "manifest necessity" or "the ends of public justice will not be served by continuing this trial" or "the jury is no longer able to reach an impartial verdict" in order to assure that retrial will not be barred by the double jeopardy clause of the Fifth Amendment?

3. After the prosecutor has made a motion for mistrial based on jury prejudice resulting from defense counsel's opening statements to the jury, and counsel have argued to the court the possible alternatives to mistrial (such as the efficacy of admonishing the jury to disregard the statements), is the trial judge required to make a specific finding or statement as to his rejection of these alternatives, or can this rejection be implied from his granting of the mistrial?

4. When defense counsel intentionally makes prejudicial opening statements to the jury calculated to elicit an objection and motion for mistrial from the prosecutor, should not the defendant be barred from then donning the constitutional cloak of double jeopardy in defense of retrial?

STATEMENT OF FACTS

I. SUMMARY

George Washington, Jr., is currently being held in custody of the Sheriff of Pima County, Arizona to stand trial for the murder of one James Hemphill, a person shot to death during an attempted burglary on the night of December 13, 1970. Washington has stood to answer for this crime before, the first time being in May, 1971 when he was found guilty of murder in the first degree. However, in 1973 he moved for a new trial which was granted on grounds of violation of due process by the State and newly discovered evidence.

Washington was brought to trial a second time in January, 1975. In that proceeding, his counsel's opening statement to the jury contained improper and prejudicial remarks maligning the professional integrity and conduct of the prosecutor in the first trial, remarks made on authority, he told the jury, of the Arizona Supreme Court. These remarks forced the county attorney to move for a

mistrial on grounds that the jury was now prejudiced against the State. The judge listened to argument, but with some hesitation denied the request without prejudice for renewal later in the trial. Testimony from two witnesses was heard, and the evening recess taken.

The following morning the county attorney renewed his motion for mistrial. Lengthy and authoritative argument was presented by counsel for both the State and the defense. At the close of argument, and over Washington's objection, the judge declared a mistrial based on defense counsel's opening statements to the jury.

Thereafter, Washington applied to the United States District Court for a Writ of Habeas Corpus on grounds that he was being held in violation of the double jeopardy clause of the Fifth Amendment. His state remedies being exhausted, the District Court granted the Writ on the sole ground that the trial judge failed to make a finding of manifest necessity or jury prejudice in declaring the mistrial. The State ap-

pealed this decision to the United States Court of Appeals for the Ninth Circuit. On December 3, 1976, in an Opinion emphasizing that the remarks made by defense counsel were improper, the Ninth Circuit affirmed the ruling of the District Court. The State petitioned this Court for a Writ of Certiorari on February 23, 1977, and it was granted April 18, 1977.

Because this Court has consistently stated that double jeopardy issues surrounding mistrial must be evaluated in terms of the facts and circumstances of each case, and because of the explicit holding in the Ninth Circuit Opinion that "this particular record fails to reveal a 'scrupulous exercise of judicial discretion' " [App. 30], the State believes that a detailed chronology of arguments of counsel, and remarks from the trial bench, leading up to the mistrial declaration in Washington's second trial, is a necessary predicate to this Court's affirmation of the underlying contention in this Brief--that the State trial judge indeed honored the Perez edict and, with sound discretion,

took all circumstances into consideration before he declared the mistrial. The State hopes the length of the following compendium of events will not impair the import of the statements presented therein.

II. Washington's First Trial: A Brady Violation By The State

On February 11, 1971, George Washington, Jr. was charged by information with the murder of one James Hemphill, hotel night clerk for the Arizona Hotel. Prior to trial, Washington moved, inter alia, for the production of all Brady materials pursuant to Brady vs. Maryland [373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)], and the prosecution responded by denying any possession thereof. [See D.C. Rec., Volume One, pp. 35-46 for respective motion and opposition to motion.] The trial was had, and on May 21, 1971, after 10 days of testimony, Washington was convicted of murder in the first degree.

On October 20, 1971, he appealed this conviction to the Supreme Court of Arizona. 16 months later Washington moved for suspension of his pending appeal and for a new trial on grounds of newly discovered evidence. On March 20, 1973, the motion was granted and the case was remanded to the Pima County Superior Court for an evidentiary hearing on the motion for a new trial. At the hearing which was held before the Honorable Judge Alice Truman on April 30, May 1, and June 4, 1973, Washington produced evidence from which he hoped it could be inferred that evidence had been intentionally withheld from him during the first trial by the County Attorney's Office, and that the prosecutor was thereby guilty of illegal and unethical conduct. [See generally App. 37 - 76.] He also filed a Memorandum alleging, inter alia, prosecutorial misconduct. [See D.C. Rec., Superior Court Files, Case No. 18980, "Memorandum in Support of Motion For New Trial", filed May 21, 1973.] Judge Truman, who had "thought a lot about this case", and had "read the

memorandum filed by the defense"[App. 77] declined to hold there was anything deliberate in the prosecutor's non-disclosure by ruling as follows:

> "...at this time I am going to grant the motion for a new trial on the grounds of violation of due process and newly discovered evidence."
> [App. 6,77.]

Evidently she had found no grounds of prosecutorial misconduct associated with the evidence not disclosed to Washington, otherwise such a finding would have been stated.

III. The Supreme Court of Arizona Fails to Agree with Washington's Accusations

The State appealed this decision to the Supreme Court of Arizona. In responding, Washington again presented his contentions that the prosecutor deliberately and unethically suppressed evidence. [See D.C. Rec.,Pleadings Filed

in the Supreme Court of Arizona, "Appellee's Answering Brief, December 21, 1973] The Court issued a Memorandum Opinion on June 20, 1974. Chief Justice Hays included in the Opinion the breadth of Washington's contention:

> "Defendant argues for a new trial on the ground that he was prejudiced by the deliberate suppression of evidence by the State." [App. 35 (misplaced in App.).]

This embodiment shows the Court fully understood they were presented with the question not only of the suppression of evidence by the State, but also the deliberateness of such suppression. The opinion discusses the suppression of evidence by the State-the statement of one James Hanrahan--as a violation of due process. Their opinion also discusses and affirms the granting of a new trial on the basis of newly discovered evidence--again, the statement of James Hanrahan. While the Court states without hesitation that the suppression of evidence was prejudicial to Washington, and that a new trial was warranted, the holding verifies that the Court did not

concur with Washington that the suppression was the product of unethical, deliberate, or intentional conduct by the State.

> "There is no evidence more valuable to a defendant than the testimony of an eyewitness that he did not commit the crime in question. The prosecution has an affirmative obligation to assure that a defendant receives a fair trial. The suppression of evidence was clearly prejudicial to the defendant and a new trial was warranted." [App. 10.]

The Supreme Court of Arizona had been asked to hold the suppression of evidence by the State was intentional and deliberate, but they refused. The Court went only so far as to affirm Judge Truman's ruling. [App. 7-15, 35(mispl'cd).]

On November 13, 1974, Washington filed a motion to dismiss in the Superior Court contending that his Sixth Amendment Rights to a speedy trial had been violated, and that the double jeopardy clause prohibited his reprosecu-

tion, for a third time asserting to a court that the prosecution was guilty of willful misconduct in deliberately suppressing evidence. [See D.C. Rec., Superior Court Files, Case No. 18980, "Motion to Dismiss," filed November 13, 1974.] Judge Truman was given another opportunity to find prosecutorial misconduct, but after listening to three days of testimony she again refused to agree with Washington's assertions of intentional misconduct by the State, and on December 13, 1974, the motion was denied. [App. 16.] Washington's new trial, which he had fought so hard to obtain, was finally scheduled to begin.

IV. Washington's Second Trial Defense Counsel's Unusual Voir Dire

In the late afternoon of January 8, 1975, after a day of voir dire, the Superior Court again empanelled twelve jurors and two alternates to try George Washington, Jr., for the murder of James Hemphill. However, Washington stood already deprived of his valued Sixth Amendment right to enjoy an impartial jury of

the State. Earlier that day in voir dire of prospective jurors, Washington's own counsel, Mr. Ed Bolding, had advised the jurors that "George" had once been convicted for murdering Hemphill.

> "Well, you know, nobody, I'm sure, has any doubt...that there was a previous trial in this case...There was a trial in this case, previous trial." [Exh.1,p. 22, lines 4-9, 13-16]; "...George has been to prison...","...this guy has been to prison," [Exh.1, p. 24, lines 19-20; 25, lines 3-9; and see 25-26, lines 10-11]; "...there'll be various Deputy Sheriff's [sic] sitting up here. And what is the reason for that? Well, the reason for that is that George is in the custody of this man right now, on this charge that was filed in December of 1970, for four years, one day and eight hours...So for four years, one day and eight hours,

George Washington, Jr., has been incarcerated, in custody of the Pima County Sheriff and the Arizona State Prison on this charge, on this charge. He doesn't look too bad for that but he hasn't liked it." [Exh.1,p. 27, lines 8-21]; "Now, knowing that George has been in custody for four years and one day and eight hours so far, four years and eleven days when this trial gets through with, knowing that he's in the custody of the Sheriffs, would that influence any of you?...Would that make you think--I know what it makes me think--but would that make you think that there's any guilt attached, anybody?" [Exh.1,pp. 28-29, lines 12-1].

Interspersed between these seemingly prejudicial comments about the status of his client was a statement the subject of which was later to become the compelling

reason for Judge Buchanan to declare a mistrial. Mr. Bolding had confided to the prospective jurors,

> "We think you'll hear some evidence to the fact that there was evidence hidden from George in the last trial."
> [Exh.1,p. 22, lines 21-23.]

All these relevations were necessary, according to defense counsel,

> "...[b]ecause of the fact that the prosecutor talked to you about the proceedings, the previous proceedings, we feel we just got to bring it on out..."
> [Exh.1,p. 22, lines 10-13.]

What defense counsel was referring to was the earlier <u>voir dire</u> conducted by "the prosecutor", Mr. A. Bates Butler, III. Therein, Mr. Butler had asked the question-

> "O.K. Anybody else? Does the fact that the alleged crime occurred almost, or excuse me, more than four years ago, does that fact and that fact alone cause you to, for one

reason or another, be unable to sit as a juror in this case?"

[App. 150.]

To this, a prospective juror, a Mr. Grgich, had immediately responded, "The only thing it would do it would raise in my mind the credibility of some of the witnesses". [App. 150 .] Several minutes and several questions afterward, Mr. Butler had gone back to addressing the potential problem expressed by Mr. Grgich.

> "Now, as one of the individuals indicated, because its been four years since this crime occurred, they may have a problem in considering testimony because memories fade. You may also see in this case the witnesses, or many of the witnesses that have testified, or will testify before you, have testified in at least two prior proceedings because we have transcripts of what they said four years ago. We know what they said but as I say, memories fade...We're asking some people to come in here to tell you about things they saw and heard and said four years ago, so there may be some witnesses who make what lawyers call prior inconsistent statments. They said something four years ago and it may not be exactly the same today. . .are there any of you that would automatically say, "That person must be a liar'?"
>
> [App. 151-152.]

Mr. Bolding had moved for a mistrial on this statement but it had been denied. [See App. 159 - 163 for arguments by counsel.]

The Court's Concern

Upon the conclusion of voir dire, the Court called certain of the jurors for individual questioning. A Mr. Elliott was called first. After posing several questions, Judge Buchanan asked,

> "Mr. Elliott, do you know why there's another trial in this case? "
>
> [Exh.1., p. 34 , lines 17-18 .]

No, he did not know, and was temporarily excused. Judge Buchanan

had a premonition of what information could yet be exposed, and gave vent to it.

> "THE COURT: I was a little concerned with the poisoning of the panel, that someone might blurt out--Mr. Butler?
> MR. BUTLER: My only concern, Judge, would be...that is as [Mr. Bolding] has said in his voir dire, that the evidence was hidden from George, that will come out, if any of these individuals knew that the motion for a new trial was granted because the State failed to produce some evidence, if that fact would cause them to feel at this time, or that they would have some prejudice against the position of the State because of that, and I think if they had such a feeling, if they have such knowledge, that we should examine whether or not that would cause them to be prejudiced."
> THE COURT: All right."

[Exh. 1,p.35, lines 9-25].

With that the court launched into an inquiry, with the help of both counsel, of each prospective juror who expressed any knowledge of the case as to whether or not he or she knew why Washington had received a second trial. With some jurors the questioning was brief, with others, quite elaborate. [See generally Exh.1,pp.33-53.] Finally, from this interrogation it was settled that not a single prospective juror knew the reason for Washington's new trial. With this done, Judge Buchanan believed he had made plain to everyone his attitude on tainted juries.

The Poisoning of the Panel

Nevertheless, the next morning, on January 9, 1975, defense counsel deprived the State of its co-existent right to an impartial jury. In his opening statement to the jurors, after many times referring to Washington's prior trial [App. 174, 175, 176-177, 181-182, 184] defense counsel told the

jury that at the first trial,

> "...the prosecutor hid [statements made by one Alonzo Rodriguez] and didn't give those to the lawyer for George at that time, didn't give those statements saying the man was Spanish speaking, didn't give those statements at all, hid them. Not this prosecutor.Prosecutor who has been taken off this case " (emphasis added). [App. 180-181.]

Forging on, in evident disregard for the wishes of Judge Buchanan, Mr. Bolding "blurted out"--

> "You will hear evidence that will show you that there was another eyewitness in this case....That evidence you will hear was not utilized at the last trial.You will hear that evidence was suppressed and hidden by the prosecutor in that case.You will hear that the evidence was purposely withheld. You will hear that because of the misconduct of the County Attorney at that

> time and because he withheld evidence, that the Supreme Court of Arizona granted a new trial in this case. That's what you will hear.
>
> You will hear that through this testimony, that the wrong man was convicted. You will hear through this testimony from George that he spent four years, two days and eight hours incarcerated for something he did not do" (emphasis added). [App. 184-185.]

Moments later, defense counsel finished his damaging statement to the jury and the noon recess was declared. The County Attorney immediately approached the Judge for the purpose of making a motion regarding defense counsel's opening statement. Judge Buchanan suggested it be made after lunch, so following the recess, out of the presence of the jury, the County Attorney moved for a mistrial on the basis that defense counsel had prejudiced the minds of the jurors against the State. He argued that defense counsel had achieved

this by telling the jury that the Arizona Supreme Court granted Washington a new trial because of the purposeful misconduct of the County Attorney who had been taken off the case, statements for which defense counsel had no proof--the Arizona Supreme Court Memorandum Opinion being inadmissible as evidence in the trial--and a statement which, regardless of its admissibility, was totally untrue. For the Arizona Supreme Court, even giving its Memorandum Opinion the broadest interpretation conceivable, chose not to so hold.

Judge Buchanan, perturbed that "[t]he whole door's been opened somehow...in the opening statement and voir dire to the jurors", demanded that defense counsel explain how the alleged hiding of evidence, and reversal of Washington's first trial, was at all material to the issue of his guilt. [App.204-5.] To defense counsel's offer of the State's "motive and bias" the prosecutor rejoined:

> "...what he's trying to do, and it's obvious by his argument

> about four years and two days and eight hours. What he wants that jury to do is say, 'Look, this guy has spent that long a time in prison because the prosecutor is guilty of misconduct', and so, you shouldn't find him guilty now'...The only reason he can want that in is to get the jury so mad at the State..."
> [App. 206-207.]

Defense counsel argued back that it was improper for Mr. Butler "to insert the fact that there were previous proceedings in the case". The Court did not agree with that, and said so. [App. 209.] The Court further did not see

> "...how the opinion of the Arizona Supreme Court in this case would be admissible on any basis whatsoever...I'm afraid, and I don't know how we stop it, we're getting to the point where we're trying the County Attorney's office and the

County Attorney's office conduct, whatever it was in the last case, and I simply, I am not going to allow it if this trial goes on and I'm very sorely tempted to grant the State's motion at this time."
[App. 209-210.]

Defense counsel, who had also promised the jury certain testimony from persons who were not then available to testify, avowed to the Court he believed he would be able to find them, and further avowed he would try to find some law supporting the admission of the Memorandum Opinion. [App. 210 .] Judge Buchanan, in subtly reminding counsel of his oath of office, accepted his avowal as to the testimony to be proved, but then,

"...when we get into the area that Mr. Butler has objected to on your argument regarding misconduct of the County Attorney's

office which was [sic] approved by the Arizona Supreme Court which resulted in a prior conviction of Mr. Washington, which resulted in his having spent four years and two days and eight hours or whatever in custody, I just can't see where that's proper."
[App. 211.]

The Court wanted to give defense counsel every opportunity to proceed with this jury, and so listened to and tried to understand his arguments through questioning. [App. 194-217.] But it was not too difficult to perceive the road the defense wished to travel in this trial.

"THE COURT: I think Mr. Bolding, in essence, if what you say is correct, then the Supreme Court should have directed that the judgment of acquittal be entered in this case because the State of Arizona, through its agents, denied this man a fair trial the

first time, because the other side of the coin is, his remedy is a new trial because of the misconduct, but I don't think you're entitled to prove all this misconduct if such is the case, to impeach every witness, and I think that's what you're saying to me."
[App. 217-218.]

Nevertheless, after additional argument, the Court denied without prejudice the State's motion for mistrial. [App. 223.]Some testimony was then taken, and the evening recess declared. But the jury that went home that night was not the same jury of that morning, for they now had knowledge of the reason for the new trial. They had knowledge not only that Washington received a second trial because of a violation by the State, they were deliberately told the violation was purposeful, that the State was guilty of misconduct by hiding evidence from Washington, and that the Arizona Supreme Court had said so. Defense counsel had undone, in his opening statement, all the prior efforts to acquire a totally fair

and impartial panel of jurors. Judge Buchanan had much to weigh.

The Only Cure: Mistrial

On the morning of January 10, 1975, before the jury reconvened, the State renewed its motion for mistrial. Exhaustive argument was heard from counsel on both sides. Mr. Butler presented Arizona rules which precluded the Arizona Supreme Court Memorandum Opinion from being admitted as evidence in a trial. He argued through analogous cases that the jury had been improperly influenced. He argued that no curative instruction given by the court could adequately cure the damage done by the defense. [See App. 285, 286, 287, 290,and 291 for Mr. Butler's several arguments against alternatives to mistrial.]

He continually stressed that the position of the State had been so prejudiced by Mr. Bolding's illegal and improper argument that it was necessary to have a mistrial granted immediately, and that this conduct created a "manifest necessity" for such a declaration. [See App. 275-284 for Mr. Butler's many statements on jury prejudice and mani-

fest need.] Defense counsel countered with his objection to a mistrial declaration, commenting that the reason for the State's request was that "they see the case going down hill". [App. 264.] Mr. McDonald, defense co-counsel, argued that he didn't think the jury was "inflamed or impassioned" at the State--that there was error by the defense but it did not create a jury atmosphere that could not render the State a fair trial, given "the remedies which should be approached before mistrial such as cautionary instructions, things of that nature." [App. 264-265.]

With the State's final expression of its position--that "[defense counsel] has so prejudiced the jury that they will not be able to do what they are supposed to, and that is give a fair trial to both sides" [App. 271], Judge Buchanan was ready to rule.

> "THE COURT: Based upon defense counsel's remarks in his opening statement concerning the Arizona Supreme Court opinion and its effect for the reasons for the trial, the motion for mistrial

will be granted." [App. 271-2.]

V. The District Court Proposes New Law

Thereafter, Washington brought a special action to the Supreme Court of Arizona, maintaining, inter alia, that Judge Buchanan proceeded in excess of legal authority, failed to perform duties required by law, and acted in an arbitrary and capricious manner in declaring a mistrial. The Arizona Supreme Court, without opinion, declined to accept jurisdiction of the Petition for Special Action. [App. 17.]

Next, on May 5, 1975, Washington filed a Motion to Quash the Indictment, on the grounds that Judge Buchanan's declaration of a mistrial was erroneous and without the consent of Washington. On June 16, 1975, the Superior Court denied Washington's Motion. Washington immediately filed a Petition for Writ of Habeas Corpus with the Arizona Supreme Court on the same grounds that supported the Motion to Quash. On July 15, 1975 the Arizona Supreme Court denied Washington's Petition without opinion. [App. 18.]

Washington had, on April 4, 1975,

applied to the United States District Court for the District of Arizona for a Writ of Habeas Corpus, contending he was being held in custody in violation of the United States Constitution.His state remedies finally exhausted, the District Court considered his petition. On October 2, 1975, in a hearing before Judge Walsh to show why the Writ should not issue, Judge Walsh ruled against Washington on the two issues presented in his petition that the deliberate prosecutorial suppression of Brady materials by the County Attorney prohibited further prosecution by the State, and that the calculated malicious, intentional misconduct of the County Attorney had denied Washington his right to a speedy trial. But Judge Walsh was concerned about one issue not briefed or argued by either party: Judge Buchanan had failed to make any finding on the record that there existed a manifest need for a mistrial. In colloquy with Mr. Butler, Judge Walsh insisted that Judge Buchanan was,

"Under the obligation, if he

grants it, to find that manifest necessity exists for the granting of it...the Judge doesn't anywhere say, that I can find, why he believes that there is manifest necessity or that it's not going to be possible for the jury to be impartial or render an impartial verdict. He doesn't make any finding. This is my problem with it."
[App. 129-130.]

Judge Walsh continued--

"I'm basing, really my ruling on the fact that Judge Buchanan didn't state any finding on the basis of which he granted except Mr. Bolding had made these remarks."
[App. 130.]

"I think there has to be a basis for granting a mistrial. I think anytime that the Judge grants a mistrial over the objection of the defendant, double jeopardy just raises its head prominently, whenever you do that, and I think its requisite that there be a finding of why you granted, that there is mani-

fest necessity for it, in the language of the cases, or at least that the Judge say, 'I find that it would be impossible if we went on with this trial,' no matter what we did about this impropriety of Mr. Bolding's it would be impossible for the jury to arrive at a fair and impartial verdict.'
[App. 131.]
"People usually, if they make a finding like that, express it."
[App. 137.]

As will be borne out by the following legal argument, the judges sustained on appeal usually did not express their findings.

At the conclusion of the hearing, Judge Walsh ruled:

> "My finding is that the order was--I cannot find that the order was based on a finding of manifest necessity for granting the mistrial, and consequently a further trial of the defendant would be a

> violation of the double jeopardy provisions." [App. 19-20,140.]

VI. The Ninth Circuit Upholds Judge Walsh

It is from Judge Walsh's ruling that the State appealed to the Ninth Circuit. That Honorable Court issued an Opinion December 3, 1976 upholding the District Court. Therein, the three judges made it clear "that the remarks made by defense counsel in his opening statement were improper" [App. 29]--"[w]hat the Supreme Court of Arizona said about the conduct of the county prosecutor has no relevance or materiality on the issue of Washington's innocence/guilt", and further supported their point of view by relying on Rule 48 of the Rules of the Supreme Court of Arizona. [App. 29, n.2.] However, the Court

> "decline[d] to imply from this impropriety that the jury was completely[1] prevented from

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[1]The Ninth Circuit later deleted the word "completely" from their Opinion upon urging by the State in its Petition for Rehearing. [See App. 33-34, "Order", dated January 20, 1977.]

arriving at a fair and impartial verdict. If this was [sic] the case, the trial judge should have so found. He at no time, however, indicates the reason(s) why he granted the mistrial. Furthermore, his short order, quoted supra, is not susceptible to any inference that will fill this void. In the absence of any finding by the trial court or any indication that the court considered the efficacy of alternatives such as an appropriate cautionary instruction to the jury, we must conclude that neither of the tests of Perez ("manifest necessity" or "ends of public justice" has been met."

[App. 29-30.]

The Ninth Circuit had admittedly founded their Opinion upon the Jorn-ian philosophy, and had imported the Jorn holding for their decision in this case--that "this particular record fails to reveal a 'scrupulous exercise of judicial discretion,' and that more consideration should have been given to the appellee's

'valued right to have his trial completed by a particular tribunal.' " [App. 30.]

The issue raised by Judge Walsh and upheld by the Ninth Circuit is before this Court on a Writ of Certiorari to the Ninth Circuit Court of Appeals. The following legal argument opposes the holdings of the two lower federal courts that have reviewed the events in George Washington's second trial.

PREFATORY STATEMENT:

AN HISTORICAL PERSPECTIVE

In 1795, when reasons for the guarantee against double jeopardy were still fresh in men's minds, a North Carolina court refused the prosecution a second trial in order to obtain better evidence against the defendant accused of a capital offense.

> ". . . in the reigns of the latter sovereigns of the Stuart family, a different rule prevailed: that a jury in such case might be discharged for the purpose of having better evidence against him at a future day; and this power was exercised for the benefit of the crown only; but it is a doctrine so abhorrent to every principle of safety and security that it ought not to receive the least countenance in the courts of this country." State v. Garrigues, 2 N.C. 241 (1795).

The Framers of the Bill of Rights, determined that double jeopardy would not reach these shores, drafted the Fifth Amendment's proscription against such practice: That no person would be subject for the same offense to be twice put in jeopardy of life or limb. Criminal defendants, at least in capital crimes, were to be forever protected from oppression, from efforts to secure, through the callousness of repeated prosecutions, convictions for whose justice no man could vouch.

The development of American criminal jurisprudence reflected this determination. The government, with all its resources and power, has not been allowed to make repeated attempts to convict an individual for an alleged offense, subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. Green v. United States, 355 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed. 2d 199 (1957). A prosecutor has not been allowed to circumvent an unwanted judge or jury, or to escape the consequences of damaging testimony by

precipating a mistrial. McNeal v. Hollowell, 481 F.2d 1145 (5th Cir. 1973); United States v. Kin Ping Chueng, 485 F.2d 689 (5th Cir. 1973).

However, the Framers were also aware of the countervailing interest in the vindication of criminal justice, which sets outer limits to the Fifth Amendment protections for those accused of crime. If a defendant appeals his conviction and obtains a reversal, he may be retried. If a defendant requests or consents to a mistrial declaration, the government is not barred from retrial. Absent governmental oppression or harassment, the Framers did not intend the policies served by the double jeopardy provision to obscure the interests of society in preventing the guilty from going unpunished. Illinois v. Somerville,[2] 410 U.S. 458, 463, 93 S.Ct. 1066, 1070, 35 L.Ed. 2d 425 (1973) ; Smith v. State of Mississippi, 478 F.2d 88, 93 (5th Cir. 1973); Howard v. United States, 372 F.2d 294, 300 (9th Cir. 1967).

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[2]Illinois v. Somerville will hereinafter be referred to as Somerville when appropriate.

George Washington, Jr., will ask this Court to believe his hypothesis, which he has unsuccessfully peddled in every state court in Arizona, in the United States District Court for the District of Arizona, and in the United States Court of Appeals for the Ninth Circuit, that the State of Arizona was, from the beginning, committed to convicting him by illegal and improper methods; that the prosecution maliciously, intentionally, and willfully hid, suppressed, and otherwise withheld material evidence from his defense counsel at his first trial; all in the spirit of harassment and oppression; all in contempt for the double jeopardy clause. The hypothesis is untrue.

In this criminal case there has been no intentional or deliberate suppression of evidence, nor has there been any other evidence of governmental harassment or oppression of Washington--no mistrial requested to afford the State an opportunity to gather better and more convincing evidence, no judge or jury unwanted by the State, no actions of the prosecutor or judge motivated by bad

faith, no state action intended to provoke a mistrial request or declaration. Nowhere is there an impropriety of the prosecution to magnify or add to the only burden George Washington, Jr. bears--that of being a criminal defendant in a murder case.

Instead, there is a first conviction, overturned upon motion of Washington for a Brady violation by the State; there is a second trial wherein defense counsel told the jurors in voir dire that Washington had once been convicted for this murder; who then advised them, in his opening statement, that the Supreme Court of Arizona had ruled the prosecutor was guilty of misconduct by willfully withholding evidence in the first trial, and that Washington was granted a second trial because of this misconduct. Instead of bad faith on the part of the prosecution, there is seeming bad faith by the defense--for not only had the Supreme Court of Arizona refused to hold the suppression of evidence by the State was a willful, deliberate act, so had Judge Truman in the Superior Court of Arizona for the County

of Pima, after two hearings and five days of testimony on the subject. Next, there is a demand by the State for a mistrial based on the prejudicial effect of defense counsel's statements, and, after lengthy argument by counsel over a two-day period, a mistrial declaration. Manifestly, there is no practice by the State that would have caused the Framers to proclaim a violation of the double jeopardy clause.

Therefore, cannot the State retry Washington for the murder of James Hemphill?

The United States District Court has initially answered this question by granting Washington, on October 2, 1975, a Writ of Habeas Corpus for a violation of the double jeopardy clause. [App.19.]

However, that Court did not grant the Writ upon any traditional consideration of abuse of judicial discretion. In the durable language of United States v. Perez, 9 Wheat 579, 6 L.Ed. 165 (1824), the analysis has usually been couched in terms of manifest necessity, and whether the trial record reveals indications of its existence. If manifest necessity

could reasonably be found to exist therefrom, the trial judge did not abuse his discretion in declaring a mistrial. Illinois v. Somerville, U.S. at 459, 35 L.Ed.2d at 428. This amorphous and often ambiguous phrase of manifest necessity has historically included the inability of a juror to agree upon a verdict [Perez], the bias or prejudice of a juror [Simmons v. United States,[3] 142 U.S. 148, 12 S.Ct. 171, 35 L.Ed. 968 (1891)], the exigencies of war-time tactics, [Wade v. Hunter,[4] 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949)], and the inevitability of a verdict overturned on appeal [Somerville]. And always, it has excluded governmental harassment and oppression of the accused. If such exists, manifest necessity does not.

Neither did the District Court grant the Writ based upon any such harangue of State oppression and harass-

[3]Simmons v. United States will hereinafter be referred to as Simmons when appropriate.

[4]Wade v. Hunter will hereinafter be referred to as Wade when appropriate.

ment. Although in his Petition to that Court, Washington nineteen times accused the State of deliberately and intentionally withholding evidence prior, during and subsequent to his first trial [See D.C. Rec., Volume One, pp 7-34], and in argument his counsel over a dozen times proposed by various assertions that the County Attorney's office was committed to illegally securing Washington's conviction in any possible manner [see App. 83-126], this was all rejected by Judge Walsh. [App.126-7,141.]

Judge Walsh granted Washington his freedom for an entirely different reason: The trial judge had failed to articulate a finding of manifest necessity or jury prejudice when he declared the mistrial in Washington's second trial. [App. 19-20, 140.]

While it has been unchallenged law for 150 years that, in the absence of consent by a criminal defendant, there must exist a manifest and imperious need for a mistrial before that defendant can be retried for the same offense, never in the history of federal jurisprudence, until the ruling of Judge

Walsh, has a reviewing court demanded statements of findings by a trial judge that there existed a manifest need for a mistrial.

This Court must be the final arbiter of this isolated issue raised by Judge Walsh. His decision, if upheld, will add a mechanical dimension to the otherwise fluid concepts of manifest necessity. The Ninth Circuit has held, as did Judge Walsh, that the statements made by defense counsel were improper, but that the trial judge should have stated, if he so found, that they were prejudicial and therefore created a manifest need for a mistrial. The State believes its first three questions presented for review [supra at page 13], all stemming from the issue raised by Judge Walsh, have never been answered by any federal court. The following argument attempts, by way of historical analysis, to answer those questions and thereby refute Judge Walsh's technical contention that a trial judge must make findings of manifest necessity when declaring a mistrial. Since the first three questions form one tripartite issue, they will be analyzed as a whole.

The fourth question, presenting the issue of defense misconduct precipitating a mistrial, will be analyzed separately.

LEGAL ARGUMENT

I. SUMMARY of the State's Position

The permissibility of reprosecution after mistrial was first considered by this Court in 1824. Justice Story decided in Perez that the discharge of a "hung" jury in a capital case did not bar further proceedings:

> "We think that, in all cases of this nature, the law has invested courts of Justice with the authority to discharge a jury from giving any verdict whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circum-

> stances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion rests, in this as in other cases, upon the responsibility of the judges, under their oaths of office."
>
> 9 Wheat at 580, 6 L.Ed. at 166.

Although the course of mistrial adjudication since Perez has provided little clarification for the touchstone term of "manifest necessity", in the unbroken line of decisions following Justice Story's mandate, not one federal (or state) court has ever held, expressly or by implication, that in order for reprosecution to be allowed after a mistrial declared over defendant's ob-

jection, a trial judge must verbalize a finding of manifest or urgent necessity or some other legal reason consistent with his discretionary opinion that the mistrial was prompted by manifest necessity. Diligent research has failed to uncover a single prop to support Judge Walsh's ruling. There is no corollary mandate in Perez that courts of justice state their opinion there is a manifest necessity for a mistrial--only that they be of the opinion that it exists.

Likewise, Perez contains no corollary mandate that there must be indicated upon the record the trial judge's consideration of alternatives to mistrial, such as was decided by the Ninth Circuit. Justice Story admonished trial judges to take all circumstances into consideration, but no where does he tell judges to indicate on the record their consideration of these circumstances. Both the District Court and Ninth Circuit holdings can be likened to "a rigid, mechanical rule which [this]Court has eschewed since the seminal decision in Perez.

Somerville, 410 U.S. at 463, 93 S.Ct. at 1070.

150 years of Supreme Court determinations on mistrial rulings have not altered these principles. Mr. Justice Rehnquist, in delivering the opinion in Somerville, did not hold that the mistrial therein met the manifest necessity requirement because the trial court did conclude the ends of public justice would be defeated-he held that manifest necessity existed because the trial court could have concluded the ends of public justice would be defeated. Id., U.S. at 459, 93 S.Ct. at 1065.

A voyage through the cases decided subsequent to Perez discloses a uniform underscoring by the reviewing courts of the trial judge's discretionary judgment, and while any abuse must be judged in the context of the facts presented, this discretion is never confined by formula or precise rule. A survey of these holdings serves to justify that the following statement of the State's position has been true to the extent of a unifying principle:

> "That the trial judge need not articulate his findings of manifest or other urgent necessity in declaring a mistrial.

If an appellate court, after reviewing the trial record, can find that the judge could reasonably have been of the opinion that a manifest need existed to declare a mistrial, and that he took all circumstances into account, such declaration will not be an abuse of discretion, and will not bar subsequent reprosecution for the same offense. That in taking all circumstances into account, the trial judge need not articulate these circumstances, nor his rejection of alternatives to mistrial if they were presented to him in argument by opposing counsel.

II. DISCUSSION

The Early Progeny of Perez

One of the first cases to depend upon Justice Story's pronouncement of judicial discretion was Simmons v. United States.

Therein, defense counsel had published prejudicial information in a local newspaper which the jurors had read. The district attorney moved to withdraw a juror because ". . .there is a manifest necessity for the act." Simmons v. United States, supra 142 U.S. at 149. The opinion as reported reveals no canvassing of alternatives prior to the mistrial declaration. The jurors were not admonished to disregard what they had read, or asked whether or not they could still decide the case impartially. Apparently, once the judge determined the information had reached their minds, a mistrial was the only solution.

The trial judge in this early case fully articulated his opinion that the jury had become biased against the prosecution, but on review, Mr. Justice Gray was not looking for such articulation. He was looking in the record for justification of the trial judge's opinion.

> "It needs no argument to prove that the judge, upon receiving such information, was fully

justified in concluding that such a publication. . .made it impossible for that jury, in considering the case, to act with the independence and freedom on the part of each juror requisite to a fair trial of the issue between the parties."
142 U.S. at 154-155.

The trial judge was fully justified in his conclusion, so held the Supreme Court. Notably, there was no reliance upon trial court findings for this justification. Query what Mr. Justice Gray would have held had the record contained evidence that the trial judge was not justified in his conslusion. Would the findings made by the trial judge have nonetheless "settled it" for the Justice? [See App. 133, where findings of jury prejudice would have "settled it" for Judge Walsh.]Would he have thereby declined to probe the record for any abuse of discretion? Plainly,the State submits not, and that trial court findings in a mistrial situation are, and

have been, transparent to the reviewing court's observance of discretion.

It is interesting to note that Justice Gray thought it important to also include in his opinion of some 85 years past a principle about which the State has been reminding courts since Mr. Bolding's prejudicial remarks to the jury on January 9, 1975:

> " 'It is an entire mistake to confound this discretionary authority of the court to protect one part of the tribunal from corruption or prejudice with the right of challenge allowed to a party; and it is, at least, equally a mistake to suppose that, in a court of justice, either party can have a vested right to a corrupt or prejudiced juror, who is not fit to sit in judgment in the case.' " [quoting from Mr. Justice Curtis' Opinion in United States v. Morris, 1 Curt. 23, 37] (emphasis added). Id., U.S. at 154 .

The exact same argument was made

by Mr. Butler before Judge Buchanan declared the mistrial.[5]

One year after Simmons, the Supreme Court decided Logan v. United States,[6] 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429 (1892). There, a jury, empanelled to decide the guilt or innocence of three alleged murderers, acquitted one after forty hours of deliberation

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[5]It is difficult to reconcile the Ninth Circuit's holding, that the judge's mistrial order was "not susceptible to any inference" of the reasons therefor [App. 30], with the State's by-then repeated argument that Mr. Bolding "has so prejudiced that jury that they will not be able to do what they are supposed to do, and that is give a fair trial to both sides" [App. 271], especially when that statement immediately preceded the judge's ruling. It defies reasoning to hold that Judge Buchanan did not have jury prejudice on his mind when he declared a mistrial.

[6]This case will hereinafter be referred to as Logan when appropriate.

but could not agree as to the other two. The trial court made no findings. It simply "approved the verdict, and ordered it to be recorded", and further ordered that the unacquitted defendants be "committed to the custody of the marshall until further order". Logan, 144 U.S. at 269, 12 S.Ct. at 619. The two defendants filed a special plea alleging that they had once been in jeopardy from the same offense. Justice Gray deferred to the trial judge's discretion, not the least troubled by the obvious absence in the record of any statements made by the trial judge confirming that he had found manifest necessity for discharging the jury. Instead, he reviewed the circumstances of the case.

> "Upon these facts, whether the discharge of the jury was manifestly necessary in order to prevent a defeat of the ends of public justice, was a question to be finally decided by the presiding judge in the sound exercise of his discretion" (emphasis added). 144 U.S. at 298, 12 S.Ct. at 628.

Thompson v. United States,[7] 155 U.S. 271, 15 S.Ct. 73, 39 L.Ed. 146 (1894), followed closely on the heels of Simmons and Logan and reflected the Supreme Court's by-then avowed reticence to tamper with a trial judge's mistrial decision--irrespective of any findings made on the record—when that record revealed a manifest necessity for the act. Mr. Justice Shiras begins his opinion of the court by espousing their practice:

> "The record discloses. . .the fact that one of the jury was disqualified by having been a member of the grand jury that found the indictment became known to the court."
> 155 U.S. at 73.

In the opinion, the Justice gives the facts of the case; that

> "the judge stated that it had come to his knowledge that one of the jurors was disqualified to sit on account of having been a member of the grand jury that returned the indictment in the case..."
> Id.

[7] This case will hereinafter be referred to as Thompson when appropriate.

While this statement of the trial judge clarifies his reason for discharging the jury, no mention is made by the Court of their reliance on this statement. The Court, however, states what it did rely upon: the holdings of Perez, Simmons and Logan, respecting the exercise of judicial discretion.

Keerl v. State of Montana, 213 U.S. 135, 29 S.Ct. 469, 53 L.Ed. 734 (1909), once again found the Supreme Court traversing the record to determine whether or not the trial judge abused his discretion in discharging a hung jury. The record revealed a very clear finding by the trial court: ". . .whereupon it satisfactorily appearing to the court that there is a reasonable probability that the jury cannot agree". Id., 213 U.S. at , 29 S.Ct. at 469. But that finding was not enough. Mr. Justice Brewer looked into the record itself before affirming that the lower court was justified in the jury discharge.

> "The record shows that the jury

were kept out at least twenty-four hours, and probably more . . ." (emphasis added).

Id., 213 U.S. at 130, 29 S.Ct. at 470.

It is safe to infer from this opinion that if Justice Brewer had not found sufficient justification in the record for the jury's discharge, any self-serving findings made by the trial judge would have carried no more weight than a feather on a scale.

The noted Judge Learned Hand also had occasion to pass on the issue of findings made by a trial judge in a mistrial circumstance, and ruled, along with his two judicial brethren Swan and Clark, that there was no necessity therefor. In United States v. Potash, 118 F.2d 54 (2nd Cir. 1941), appellants' trial had ended in a mistrial after the jury had been discharged. On appeal, they argued that "a plea of double jeopardy must be sustained unless the reason for discharging the jury before verdict is entered upon the record" (emphasis added). 118 F.2d at 55. The record read "at 12:45 P.M. the jury is discharged and mistrial ordered". The trial tran-

script disclosed that only eleven jurors had returned after a lunch break, and that the trial judge stated "under the circumstances" the only thing he could do was discharge the jury. Id. The Circuit Court, noting "the appellants have found no federal authority supporting their technical contention"(emphasis added) [id.], admonished:

> "In the federal courts the recognized rule is that discharging a jury before a verdict is a matter within the sound discretion of the trial court. [Citations omitted.] Granting that the exercise of such discretion may be reversed in a case of abuse, the burden should be on the appellant to show abuse. A defendant who pleads double jeopardy has the burden of proving his plea" (emphasis added).

118 F.2d at 56.

In comparing Potash to the case at bar, not only did the Potash trial judge fail to declare manifest need for a mistrial, he did not even verbalize a reason for discharging the jury. Yet,

the reviewing court overruled a plea of former jeopardy because it could infer from the record that one of the jurors had become incapacitated. 118 F.2d at 55. Judge Buchanan did more than the Potash trial judge who was upheld by the Second Circuit. Judge Buchanan peppered the trial record with verbal indications that he was not predisposed to trying the guilt of the County Attorney's office along with Washington [see App. 204-205, 209-210, 211, 212, 217-218], and while he did not specifically articulate a finding of manifest need, he gave a solid reason for declaring a mistrial--the "effect" of defense counsel's opening statement (which statement was directed solely to the jury) "concerning the Arizona Supreme Court opinion." [App. 271-272.][8] As in Potash "the

[8]The Ninth Circuit has stated in their opinion that Judge Buchanan did not at any time indicate his reasons for granting the mistrial. [App. 30.] It is again difficult to reconcile that Court's point of view with the actual facts of the case that were before it.

inference is obvious" (118 F.2d at 55) from a reading of the entire trial court record that Judge Buchanan could have believed the jury had become less and less impartial since the outset of the proceedings and that defense counsel's accusatory statements had done permanent damage to the "edifice of justice" so that it was possible, in fact probable, that it no longer stood symmetrical to both sides. Palko v. Connecticut, 302 U.S. 319, 328, 58 S.Ct. 149, 156, 82 L.Ed. 288 (1937).

The case of Wade v. Hunter, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949), reh. denied, 337 U.S. 921, 69 S.Ct. 1152, 93 L.Ed. 1730 (1949), saw the Supreme Court apply civil interpretations of the Fifth Amendment to military court proceedings. Soldier Wade was charged with rape, and the military trial court, needing to consider testimony of two additional witnesses, continued the trial. Subsequently, charges were withdrawn, and the case was transferred to another infantry division. The only verbalized reason for this transfer can be found in a communication from Headquarters to the Commanding General

that "[d]ue to the tactical situation the distance to the residence of such witnesses has become so great that the case cannot be completed within a reasonable time." Hunter v.Wade, 72 F.Supp. 755, 759 n. 3 (1947). The case was transferred again with a similar communication that "[i]t was impracticable to try this case. . . at this headquarters at this time in view of the tactical situation and fact that the location. . .of necessary civilian witnesses are a considerable distance without the boundaries of this command". Id., n.4.

The federal district court held that this was not the kind of "imperious" or "urgent necessity" that came within the recognized exception to the double jeopardy provision. On appeal, the Tenth Circuit reversed, one judge dissenting. That Court speculated on the reasons for transferring the case, only to emphasize the absurdity of attempting to second-guess the Commanding General's decision (who was analogized to a judge in a civilian court).

> "Distance of the persons from the then situs of the court was one element entering into

> the situation. Perhaps other essential elements inhered in it. . .On the other hand, it may be that distance or emergencies growing out of the prosecution of the war did not make it impossible or unreasonably difficult to produce the witnesses before the court and obtain their testimony. It may be that the case should have remained with the court instead of being withdrawn. But that was a matter to be determined by the Commanding General in the exercise of his sound discretion; and, taking into consideration the conditions and circumstances presenting themselves, he determined in the exercise of such discretion that the tactical situation made it necessary or advisable to withdraw the case from the court-martial and to refer it to the Commanding General of the Third Army for trial before another court--martial" (emphasis added).

Hunter v. Wade, 169 F. 2d 973, 976 (10th Cir. 1948).

On Writ of Certiorari, the Supreme Court held for the government in an elaborate explanation, part of which follows:

> "The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. . .What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just

> judgments. When justice requires that a particular trial be discontinued is a question that should be decided by persons conversant with factors relevant to the determination."
> 336 U.S. at 688-689, 69 S.Ct. at 837

The Supreme Court reminded trial judges

> "to take 'all circumstances into account' and thereby forbid the mechanical application of an abstract formula. The value of the Perez principles thus lies in their capacity for informed application under widely different circumstances, without injury to defendants or to the public interest."
> 336 U.S. at 691, 69 S.Ct. at 838.

The Commanding General had given their reasons for transferring Wade's charges. But as clearly articulated by the Tenth Circuit, it did not matter what the reasons were, so long as there appeared to the Commanding Generals an urgent need. And whether or not there so appeared an urgent need to these men was

not answered by any statements made in the record. It was answered, for the Supreme Court and Tenth Circuit, by the record itself. This war-time Supreme Court, as some would call it, did nothing different than any Supreme Court before it--it looked solely to the record for manifest need.

> ". . .this record is sufficient to show that the tactical situation brought about by a rapidly advancing army was responsible for withdrawal of the charges from the first court-martial. . . There is no intimation in the record that the tactical situation did not require the transfer order."
>
> Id.

In likely comparison, Judge Buchanan very plainly stated his reason for declaring a mistrial--"defense counsel's remarks in his opening statement concerning the Arizona Supreme Court opinion and its effect for the reasons for the new trial." [App.271.] But the articulated reasons form only a guide for the reviewing court to follow. To borrow the logic of the Tenth Circuit:

The "effect" of Mr. Bolding's statements on the jury was one element entering into Judge Buchanan's decision. Perhaps the seriousness of the evidentiary impropriety attaching to several of his remarks also inhered in it. Perhaps the constant harping by Mr. Bolding on Washington's prior conviction also entered into it. On the other hand, it may be that the prejudicial impact on the jury from all the statements did not create such a manifest need to declare a mistrial. It may be that the error could have been corrected by a cautionary instruction. But that was a matter to be determined by the trial judge in the exercise of his sound discretion. And whether or not he exercised his sound discretion is not to be determined from his findings and statements,or lack thereof. Whether or not he considered alternatives to mistrial is not to be determined by his statements that he did so. The record itself is the only indicator, for findings cannot control the effect of the facts.

To now borrow the logic of the Wade Supreme Court, the record before this Court is sufficient to show that the statements made by Mr. Bolding were responsible for Judge Buchanan's act, and there is no intimation in the record that those state-

ments did not require the declaration. The State argues that Judge Buchanan, sitting in the midst of this trial environment, listening to Mr. Bolding's voir dire and opening statement, observing the jurors' attentiveness thereto, and always responsive to arguments of counsel, which several times included alternatives to mistrial, could reasonably have found a manifest need for declaring a mistrial.

This Court has time after time propounded, that if a review of the record shows the trial judge could have found manifest necessity, his mistrial ruling will not be disturbed. Judge Walsh did not analyze the trial court record to determine if Judge Buchanan could have found manifest necessity from all that had transpired in his courtroom. He wanted assurance, through statements in the record, that it was found. Judge Walsh did not allow Judge Buchanan to testify that he was of the opinion there was manifest necessity for the mistrial. [See App. 143-147 for motion to re-open evidence on affidavit of this opinion]. To Judge Walsh, if this opinion, held or not, there was no

justification for the mistrial. Judge Walsh's formula boils down to one simple equation:

NO FINDINGS = NO MANIFEST NECESSITY.

No more mechanical evaluation of the proscription against double jeopardy in a mistrial circumstance could possibly exist.

A Case Misconstrued

In 1961, the Supreme Court decided the case of Gori v. United States.[9] 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed. 2d 901, (1961), reh. denied, 368 U.S. 570, 82 S.Ct. 25, 7 L.Ed. 2d 70 (1961). Therein, the Court was asked to pass upon the action of an "overassiduous" trial judge who sua sponte declared a mistrial, apparently to forestall a line of questioning he thought was intended to disclose the accused's other crimes. The Supreme Court relied heavily on the review of discretion made by the Court of Appeals which had affirmed the trial court's ruling. Also, the Supreme Court

[9]This case will hereinafter be referred to as Gori when appropriate.

interpreted the Court of Appeals' decision as one based upon an analysis of the trial judge's extreme solicitude for the defendant.

> ". . .[i]t was unclear what reasons caused the court to take this action. . . In any event, it is obvious, as the Court of Appeals concluded, that the judge 'was acting according to his convictions in protecting the rights of the accused.' " Id., 367 U.S. at 366-367, 81 S.Ct. at 1524-1525.

Consequently, later Supreme Court and Circuit Court decisions assessed the Cori decision as a possible "variation on the [Perez] theme according to a determination by the appellate court as to which party to the case was the beneficiary of the mistrial ruling." United States v. Jorn,[10] 400 U.S. 470, 91 S.Ct. 547, 555, 27 L.Ed. 2d 543 (1971); Downum v. United States.[11] 372

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[10]This case will hereinafter be referred to as Jorn when appropriate.

[11]This case will hereinafter be referred to as Downum when appropriate.

U.S. 734, 736, 83 S.Ct. 1033, 1034, L.Ed. 2d 100 (1963) United States v. Smith, 390 F.2d 420 (4th Cir. 1968);United States v. Glover, 506 F.2d 291, 296 (2nd Cir. 1974). The State respectfully submits that the Gori Supreme Court's interpretation of the Second Circuit's Opinion was misplaced, and that Gori was actually affirmed by the Circuit Court upon a traditional analysis of Fifth Amendment precepts.

The judges of the Second Circuit were of the collective opinion that this case "presented a general problem important to the administration of justice in the circuit" [United States v. Gori, 282 F.2d 43, 44 (1960)], and thereupon voted upon its disposition en banc. The opinion lays out portions of the transcript showing how the "Assistant United States Attorney attempted to prove this fairly simple case" by testimony of several witnesses, and how he "ran into repeated difficulty, however, in part because of continuous formal objection by the defense, but even more by interference on the part of the trial judge, who repeatedly ordered the reframing of questions and otherwise took the conduct of the

case away from him." 282 F.2d at 45, n.3. The eventual mistrial declaration by the trial judge, "because of the conduct of the district attorney" [Id.], was also set forth in the opinion, and for this Court's interest is repeated below.[12]

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[12]"The Court: If you ask one more question that alludes to suspicion, I will withdraw a juror and put this case over to January of next year. Now, I want this crime proved, not nine others.

Mr. Passalacqua: I am not referring--

The Court: That is exactly what you are going to lead this jury to believe. These agents are helpless. They have got to--. Juror No. 1, step out. I declare a mistrial and I don't care whether the action is dismissed or not. I declare a mistrial because of the conduct of the district attorney.

Mr. Passalacqua: I am not--

The Court: You heard me. I don't want any more District Attorneys coming down here telling me how I am going to try the cases. And tell your chief if he doesn't want to put any more cases on before me, it is all right with me. That's all."
Id.

The Second Circuit did not agree with the trial judge that the conduct of the district attorney was improper. [Id., at 46, 48, and 51]. Nonetheless, the Court affirmed the declaration of a mistrial as within his discretion, but took great pains to explain their rationale, a part of which follows:

> "The colloquy set forth in the margin demonstrates that the prosecutor did nothing to instigate the declaration of a mistrial and that he was only performing his assigned duty under trying conditions."
> Id., at 46.

The reviewing court did no more than analyze the facts before them in the framework of governmental harassment and oppression. Finding none, there was no reason for the government to be barred from retrying the defendant.While the Court acknowledged that the trial judge declared the mistrial to protect the defendant's rights, their ruling was based on a subtle but imperative distinction--that the defendant was not prejudiced by retrial. His "protected

rights" were ancillary to the crux of the holding:

> "On this basis we do not believe decision should be difficult, for the responsibility and discretion exercised by the judges below seem to us sound. Here the defendant was in no way harmed by the brief trial which, indeed, revealed to him the prosecution's entire case. He was thus in a position to start anew with a clean slate, with all possibility of prejudice eliminated and with foreknowledge of the case against him. The situation was quite unlike the more troublesome problems found in various of the cases, as where the prosecution desires to strengthen his case on a new start or otherwise provokes the declaration of mistrial, or the court has acted to the prejudice of the accused, or the accused has actually been subject to two trials for es-

sentially the same offense."
Id, at 48.

The foregoing anatomy of the Gori decision, which the State believes to be the correct one, is easily overlayed upon the case presently before this Court. In Gori, as in Washington's second trial, there were no findings or statements of some manifest need made by the trial judge. The Courts reviewing the Gori trial, judging from the opinions, weren't looking for any.[13] The Second Circuit was interested in whether there was indicia of government oppression in the record, and whether the defendant would be subjected to preju-

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[13]It is important to recall that the Second Circuit didn't even agree with the trial judge that the district attorney acted improperly.Therefore this stated reason by the judge for the mistrial declaration could have had no influence upon their holding that there existed a manifest necessity for the act.

dice by retrial.[14] The judges found none of the historical indicators in the trial record; thus, jeopardy did not attach.

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[14]The Supreme Court later seems to acknowledge this reasoning as the key to Gori. In Downum, 372 U.S. at 736, 83 S.Ct. at 1034, Gori is cited as authority for the principle that "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches, inferring if not clearly expressing that jeopardy did not attach in Gori because harassment had not been found. And in Jorn Mr. Justice Harlan sharply criticized the Supreme Court's Opinion in Gori, in which he had joined, and explicitly rejected any limitation on review based upon the intended beneficiary of the mistrial. Id., 400 U.S. at 483 .
See also United States v. Beasley, 479 F.2d 1124, 1126 (5th Cir. 1973) for this same acknowledgment.

In looking at the record of Washington's second trial, neither will this Court find any indication of government oppression; on the contrary, it should be hard to conclude that Washington was at all harmed by the brief trial. He has had, since January 10, 1975, an opportunity to begin anew "with all possibility of prejudice eliminated and with foreknowledge of the case against him". Id. The State is requesting the same conclusion that was reached in Gori by the Second Circuit for the case at bar.

"Unlimited, Uncertain, and Arbitrary Judicial Discretion"[15]

In the early cases following Perez, the language of "caution" and "necessity" drew far less attention than Perez's repeated references to "discre-

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[15]This is the closing passage in Downum [372 U.S. at 738, 83 S.Ct. at 1035-1036], describing what the Supreme Court there refused to sanction. The phrase can be equally associated with the behavior of the Jorn trial judge.

tion". Up to this point, Perez had been continually cited as a case narrowly limiting the power of appellate courts to question a trial judge's mistrial order. Gori is the penultimate example of this limitation. But there came a time when the language of "manifest necessity" and the warning that the power to declare mistrials "ought to be used with the greatest caution, and under urgent circumstances" was brought to bear by the Supreme Court. In ostensible radical transformation of the jurisprudence of mistrials, the Court decided Downun v. United States and United States v. Jorn.

In the District of Western Texas, in April of 1961, a jury had been sworn and trial was about to begin for one Raymond Downum, a man charged with stealing from the mail and forging and uttering checks so stolen. The government was told to proceed with its case, but instead of calling his first witness, the prosecutor asked that the jury be discharged because its key witness for two of the seven counts charged had not been served with subpoena. The jury was discharged, a new trial was had, and

conviction resulted over a plea of double jeopardy. On appeal, the Fifth Circuit affirmed. Downum v. United States, 300 F.2d 137 (5th Cir. 1962). On Writ of Certiorari, the Supreme Court did not. The Court recognized this situation as one where the district attorney entered upon the trial of the case without sufficient evidence to convict; a prime examplar of the Framers' fears. As later pegged by the Ninth Circuit in Oelke v. United States, 389 F.2d 668, 672 (9th Cir. 1967), the reason why double jeopardy attached to Downum was "the possibility of the unjustified harassment of citizens due to the whims of the prosecuting officer." The Supreme Court, faithfully watching for violations of our Constitution, had clearly found one in the successive trials of Raymond Downum.

This was the first circumstance of mistrial the Supreme Court did not uphold. Realizing they were treading uncharted waters, the groundwork for this decision was carefully laid out by the Court in its opinion. Cornero v. United States, 48 F.2d 69 (9th Cir.

1931), was quoted at length. Also, United States v. Watson, 28 Fed.Cas. 499 and United States v. Shoemaker, 27 Fed.Cas. 1067 were relied upon. These relied-upon cases made clear their complete reliance upon the record for indications or absence of manifest necessity. For example, in Watson, that court reasoned:

> "The mere illness of the district attorney, or the mere absence of witnesses for the prosecution, under the circumstances disclosed by the record in this case, is no grounds upon which, in the exercise of a sound discretion, a court can, on the trial of an indictment, properly discharge a jury. . .To admit the propriety of the exercise of the discretion on such grounds would be to throw open the door for the indulgence of caprice and partiality by the court, to the possible and probable prejudice of the defendants. When the trial of an indictment has been commenced

by the swearing of the jury, the defendant is in their charge, and is entitled to a verdict of acquittal if the case on the part of the prosecution is, for any reason, not made out against him, unless he consents to the discharging of the jury without giving a verdict, or unless there is such a legal necessity for discharging them as would, if spread on the record, enable a court of error to say that the discharge was proper." [28 Fed.Cas. at 500-501]

Downum, 372 U.S. at 738,n.1,83 S.Ct. at 1035, n.1.

The Watson Court had not stated, as Judge Walsh would have it, ". . .unless there is such a legal necessity for discharging them as would, if stated, enable a court of error to say the discharge was proper." The Watson court looked for legal necessity spread on the record. All it found was a prosecutor, waiting for a better day to convict. The Downum Court,relying thereon,cited many

cases where manifest necessity was held to exist, and looked to the record before it for any similarities. Instead, all the Court found was a prosecutor, again, waiting for more evidence to convict.

The State does not argue that Judge Walsh did not look at the record of Washington's second trial. He "examined it and studied it and renewed the examination" before the hearing on October 2, 1975. [App. 126.] But his examination was misguided. He was not looking for events from which Judge Buchanan could reasonably have found manifest necessity for the mistrial declaration. He was looking for findings. . .words. . . some statement to confirm that Judge Buchanan felt manifest necessity existed in that trial.

> ". . .if he said, 'There is absolutely no way that I think we can undo this to the extent that an impartial verdict would be a possibility.' this would settle it for me. But I can't find it."
> [App.133.]
> ". . .how can I or anybody

else say that Judge Buchanan found manifest necessity, when it would take fifteen words or twenty words to say it and he didn't say it?"
App.133-138.]

Mr. Butler correctly argued to the District Court that "no case says that a Judge has to use the magic words of 'manifest necessity'. I think what they have to find is that record supports that manifest necessity was dictated. . .". [App.138.] Judge Walsh replied, then you would get the ruling "from somebody who looks at the record and says, 'Well, I think it would have supported this, and I make the finding'. . .I can't do it." [App.138-9.] The cases say without exception that he could have.

1971 saw the Supreme Court grapple with a mistrial, declared by a judge who was at best erratic in his trial decision. The trial judge in United States . v. Jorn in a total abdication of his responsibility to exercise sound discretion, abruptly aborted the proceedings prior to verdict on the belief that certain witnesses, who were to testify in a tax fraud case, had

not been sufficiently warned of their consitutional rights. The trial judge, giving no "reason", had stated:

> "So this case is vacated, setting is vacated this afternoon, and it will be calendared again; and, before it is calendared again, I am going to have these witnesses in and talk to them again before I will permit them to testify."
> 400 U.S. at 489, 91 S.Ct. at 559, note 1.

In declaring there was no manifest need to declare a mistrial, the Supreme Court listed the trial circumstances that were of paramount importance to their holding, and the lack of an express finding of some manifest necessity found by the trial judge was not one of them.

> ". . .the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so.

When one examines the circumstances surrounding the discharge of this jury,it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account there was a manifest necessity for the sua sponte declaration of this mistrial. . .Therefore, we must conclude that in the circumstances of this case, appellee's reprosecution would violate the double jeopardy provision of the Fifth Amendment." 400 U.S. at 487, 91 S.Ct. at 558.

It is this case, this set of circumstances, that the Ninth Circuit, in spite of forewarning by the Somerville Supreme Court, has chosen to equate with those surrounding Washington's second trial. In Somerville, this Court refused to rely on its holding in Jorn and cautioned other courts from doing the same, unless the facts of the case before them equated with those in Jorn.

> "While it is possible to excise various portions of the plurality opinion to support the result reached below [447 F.2d 733],divorcing the language from the facts of the case serves only to distort its holding." 410 U.S. at 469.

The Ninth Circuit did nothing if not excise portions of the Jorn opinion and apply them to the facts surrounding Judge Buchanan's mistrial ruling, evidently failing to discern that the exercise of judicial discretion in Jorn differed substantially from the instant case. Presented here is no abrupt discharge, no absence of opportunity for counsel to object, no absence of suggested alternatives to mistrial: the State argues, in essence, no failure to exercise sound discretion.

From a reading of the Ninth Circuit Opinion, the judge did not consider the fact that defense counsel's conduct occasioned the mistrial declaration. Of unescapable importance in the case at bar, it was Mr. Bolding who told the jury that there was a prior trial, and

that Washinfton had once been convicted for the crime of killing James Hemphill. It was Mr. Bolding who told the jury the prosecutor in the first trial had been taken off the case for misconduct,[16] and that the Arizona Supreme Court had granted a new trial because of willful hiding of certain evidence in the prior trial by that prosecutor. While it may at times be difficult for a judge to distinguish excessive zeal from intentional precipitation of mistrial, here the anomaly must give way to defense counsel know-

[16] Mr. Jon R. (Ric) Cooper, the County Attorney trying the case in the first trial, was not "taken off the case" for misconduct. As Mr. Butler argued to Judge Buchanan, and as Mr. Bolding was aware, Mr. Cooper was not trying the case the second time, in 1975, because the County Attorney's office suspected there was a likely possibility that he would be called as a witness, if Mr. Butler were allowed to delve into the wiring of Hanrahan as impeachment, or to show motive or on some other evidentiary basis. [See App. 201-202 for Mr. Butler's argument.]

ingly (or should have known he was bringing about the mistrial ruling.

In this context, a pertinent paragraph from the Jorn majority seems to have been lost upon the Ninth Circuit.

> "The conscious refusal of this Court to channel the exercise of that discretion according to rules based on categories of circumstances, [see Wade v. Hunter, 336 U.S., at 691, 69 S.Ct., at 838], reflects the elusive nature of the problem presented by judicial action foreclosing the defendant from going to his jury. But that discretion must still be exercised; unquestionably an important factor to be considered is the need to hold litigants on both sides to standards of responsible professional conduct in the clash of an adversary criminal process." 400 U.S. at 486-487, 91 S.Ct. at 557.

And of singular relevance to the instant facts, Chief Justice Berger thought it important to write a separate, concurring opinion (paragraph) to stress:

"If the accused had brought about the erroneous mistrial ruling we would have a dif ferent case. . ." 400 U.S. at 488, 91 S.Ct. at 558 (emphasis added).

In Washington's second trial, it was: "the accused", by way of his counsel, who brought about the mistrial ruling. Therefore, it is a different case from Jorn, and the Ninth Circuit's total reliance upon unrelated, segregated holdings in the Jorn opinion has neither basis in fact nor law.

Shades of Chief Justice Berger's concurring opinion were destined to appear three years hence in United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, L.Ed. 2d 267 (1976).

In revealing the Ninth Circuit's mistaken reliance upon Jorn, it is further enlightening to review several of the Circuit Court cases which have relied on Jorn in striking down mistrial rulings. Not one can be likened to the facts of Washington's second trial.

McNeal v. Hollowell, [supra at page 49] saw the Fifth Circuit, in 1973, examining a trial judge's ruling of nolle prosequi upon the prosecutor's request,

once he found out he could not make out a murder case against the defendant with the witnesses he had to testify. The trial court had immediately granted the district attorney's request, without requesting or listening to any suggested alternative solutions, and cutting off argument by defense counsel. 481 F.2d at 1148, n.3. The court held that the trial judge should have made a painstaking examination of all the facts and circumstances that underlied the request; that only then could he have properly exercised his discretion.[17]

[17] The Fifth Circuit, in building its rationale, made a statement of principle of utmost relevance to the case at bar, because it totally opposes the holding of Judge Walsh. That Court "took no issue" with the principle that "the language used by the trial judge in discharging the jury is not dispositive of the reasons behind the discharge." 481 F.2d at 1150, 1151. It was wholly unconcerned with what reasons the trial judge gave for granting the nolle prosequi (there were no findings of any manifest need--the judge gave as a reason that the prosecutor was unable to make out his case [id., at 1148,n.3]), and went into the record to determine that no manifest necessity and no ends of public justice required the ruling.

Here is a combination of events that at once lends itself to prosecutorial manipulation, portrays ill-reasoned, premature judicial behavior, and portends great potential for prejudice to the defendant. There is no resemblance to the facts now before this Court.

In United States v. Glover, 506 F.2d 291 (2nd Cir. 1974), the Second Circuit was faced with a prosecutor who offered, for the time, Bruton evidence during the trial, although the clear alternative was to have sought and obtained the ruling . in advance. With particular emphasis that defendant Glover "had done nothing to bring about the contretemps that resulted in the declaration of mistrial" [id., at 297-298], and we the "Inadequacy of the government's proof discovered after the jury is empanelled" [id.], the Court ordered Glover's indictment dismissed after it opined:

> "The thrust of the opinion [in Jorn] is that where the mistrial is not motivated for the benefit of the defendant, and the defendant has done nothing himself to create the problem,

> he is entitled to his double jeopardy protection. . .
> The Chief Justice concurred in the majority opinion in Jorn on the specific ground that the defendant had done nothing to bring about the mistrial ruling. . ."
> Id., at 297.

The facts in Glover again show the prospect of prosecutorial manipulation, which is not an element in Washington's case, and more importantly, the crux of the decision is that the problem did not in any manner originate with the defendant.[18] Here, the problem did originate

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[18]The Second Circuit considered the gravity of the fault of the prosecutor in light of the fact that the problem he created could have been alleviated by obtaining a judicial ruling on his evidence prior to trial. As was argued by Mr. Butler to Judge Buchanan, Mr. Bolding had planned to attempt to introduce the Arizona Supreme Court opinion as evidence, and he should have obtained a ruling in advance, rather than wait until the jury had been empanelled and thereby create some error in the proceedings.[See App. 213-215 for this argument.]

with the defendant, through his counsel's improper opening statements to the jury.

The Fifth Circuit also decided United States v. Kin Ping Cheung [supra at p. 49] in 1973. The case was similar to McNeal v. Hollowell in that it provided "a tantalizing potential for prosecutorial misconduct". 485 F.2d at 692. The prosecution's witness had taken the stand and had given testimony tending to exculpate one of the defendants. The Court reasoned: "The Government, knowing what this witness would testify, would have a new opportunity at the later trial to seek a severance. . .and refrain from calling him at the other defendant's trial." Id. This case further involved a hasty, sua sponte mistrial declaration where no alternatives were suggested to and thereby considered by the trial judge. The Court concluded that the Government stood to gain great advantage from the mistrial ruling, and, supported by Jorn, ruled that double jeopardy had attached.

In keeping with the Supreme Court's reasoning in Jorn, the foregoing Court of Appeals cases all depicted,as

the instigator of the difficulty which occasioned the mistrial, the government, and all carried a potential for resulting prejudice to the defendant.

In Washington's second trial it is the other way around.

In final argument against the Ninth's Circuit reliance on Jorn, which caused the defendant's "valued right to have his trial com pleted by a particular tribunal" to be emphatically if not singularly stressed, in their Opinion, and which principle the Ninth Circuit loftily charged Judge Buchanan with neglecting,[19] it should here be remembered that while Judge Buchanan was weighing and balancing the conflicting interests in a mistrial declaration (as it must be assumed he did while listening to hours of argument by counsel), Washington's right to a potentially favorable judgment by that tribunal had already been seriously, if not irrevocably, tarnished

[19] In concluding their Opinion, the Judges admonished that Judge Buchanan should have given more consideration to Washington's "valued right to have his trial completed by a particular tribunal," citing Jorn as authority for that reprimand.

by his own counsel's statements to that tribunal that Washington had previously been convicted of the crime for which he stood before them supposedly innocent until proven guilty. Moreover, Mr. Bolding admitted to Judge Buchanan on the second day of arguing the mistrial issue, that, "I'm not happy with the jury" empanelled to try Washington, [App. 245.] If Mr. Bolding did not like the jury, and if Mr. Washington did not like the jury[20]

[20] In his opening argument, when Mr. Bolding had once more told the jurors that "George had been to prison", he hesitated and then said, "George didn't want me to tell you that". [App.179.] Further, "George" probably had not wanted Mr. Bolding to reveal his prior conviction. It would be unusual for a defendant to want his jury told that he had already been convicted for this murder by another jury four years ago. These relevations by defense counsel to the jury during voir dire and his opening statement patently diminished the actual value to be placed upon Washington's right to continue with this jury. It would be ignoring "the circumstances" of the case to conclude that Judge Buchanan did not consider this in his ruling.

surely the weight given to Washington's right to have that jury decide his guilt or innocence was lessened in the eyes of Judge Buchanan when he balanced that interest with the competing interest of the public in fair trials designed to end in just judgments [Wade, 336 U.S. at 688-689, 93 L.Ed. 974]. Judge Buchanan needed little argument to recognize that the trial had developed into something less than fair. A reading of the transcript of Washington's second trial yields the inescapable conclusion that that particular tribunal was no longer "the impartial jury" guaranteed to Washington as one of his fundamental rights.

From all the foregoing, which events Judge Buchanan was in the best place to observe, he could reasonably have found the delicate balance tipping in favor of the public's interest in just judgments. This right to take his case to the original jury, normally to be accorded great weight in the decision process of granting a mistrial, did not have for Washington the "value" that the Ninth Circuit placed upon it.

It can hardly be said that Judge Buchanan exercised unlimited, uncertain or arbitrary judicial discretion.

Following closely on the heels of Jorn came the occasion for the Supreme Court to decide the merits of a mistrial ruling by a State court on Fifth Amendment grounds. Defendant Somerville was indicted by the Illinois grand jury, and after a jury was empanelled, the prosecutor discovered the indictment was insufficient to charge a crime and immediately moved for a mistrial. The Illinois trial court granted the State's motion. In affirming, this Court stated unequivocable adherence to the flexible Perez standard giving the trial judge broad discretion to decide a mistrial issue, and, after citing language in Wade and Gori to underscore the breadth of the trial judge's discretion, the Supreme Court considered the propriety of the trial judge's discretionary action in the context of that particular trial. In holding that the "mistrial met the 'manifest necessity' requirement" of the Supreme Court's cases, "since the trial court could reasonably have concluded that the 'ends of public justice' would be defeated by having allowed the

trial to continue" [Somerville, 410 U.S. at 459, 93 S.Ct. at 1068], the Court reassured its followers that the public's interest in fair trials designed to end in just judgments "had not been disregarded by this Court". 410 U.S. at 463, 93 S.Ct. at 1070. The Somerville justices, led by Justice Rehnquist, went on to establish the following approach for deciding double jeopardy issues:

> "While all of the cases turn on the particular facts and thus escape meaningful categorization, [citations omitted], it is possible to distill from them a general approach, premised on the 'public justice' policy enunciated in United States v. Perez, to situations such as that presented by this case. A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in

the trial" (emphasis added).
410 U.S. at 464, 93 S.Ct. at 1070.

From a look at all the events in the trial record this Court should be able to find that Judge Buchanan could reasonably have concluded Mr. Bolding's statements had prejudiced the minds of the jury against the State so that an impartial verdict could no longer be reached.[21]

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[21] Judge Buchanan could also very probably have concluded that the statements made by Mr. Bolding were improper as well as prejudicial. Somerville would seem to uphold a mistrial that implements a reasonable State policy; and the policy of the State of Arizona is to preclude any reference by counsel to evidence which has no bearing on the case at issue. Udall, Arizona Law of Evidence, 111 at § 201 (1960). Further, Rule 48(c), 17 A.R.S. Rules of the Supreme Court and Rule 314, 17 A.R.S. Rules of Criminal Procedure would have required the exclusion of the prior Arizona Supreme Court Memorandum Decision and evidence of alleged prosecutorial misconduct in the subsequent trial. [See pp. 9 - 12 , supra for these reference materials; and see App.29 where the necessity of this exclusion is recognized by the Ninth Circuit.]

On this issue of prejudice, the holding of the Second Circuit in United States ex rel. Hetenyi v. Wilkins, 348 F.2d 844, (2nd Cir. 1964) is a significant and correct reflection of the law:

> "The question is not whether the accused was actually prejudiced, but whether there is reasonable possibility [emphasis in the opinion] that he was prejudiced. [Citations omitted.]. . .
> The ends of justice would not be served by requiring a factual determination that the accused was actually prejudiced in his third trial by being prosecuted for and charged with first degree murder, nor would the ends of justice be served by insisting upon a quantative measurement of that prejudice."

Accord, United States ex rel. Stewart v. Hewitt, 517 F.2d 993, 996 (3rd Cir. 1975); United States v. Pridgeon, 462 F.2d 1094, 1095 (5th Cir. 1972); and see Whitfield v. Warden of Maryland House of Correction, 486 F.2d 1118, 1121 (4th Cir. 1973)

where the Court viewed the Perez doctrine in light of public justice concepts to hold that manifest necessity never implies an absolute need to declare a mistrial. But perhaps the clearest exposition of this rule is Mr. Justice Black's dictum in Wade v. Hunter:

> "[T]here have been instances where a trial judge has discovered facts during a trial which indicated that one or more members of a jury might be biased [emphasis in opinion] against the Government or the defendant. It is settled that the duty of the judge in this event is to discharge the jury and direct a retrial." (Emphasis added.) 336 U.S. at 689, 69 S.Ct. at 837.

Not only is there a "reasonable possibility" that Mr. Bolding's opening statements prejudiced the jury against the State, it is quite probable. That Judge Buchanan could have seen this prejudice developing and concluded it was beyond cure is an easy conclusion to draw from the record.

The majority decision in Somerville, which offered some hope for meaningful analysis and predictable results, at the same time cautioned that Justice Story's formulation--

> "abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial." 410 U.S. at 462.

The holding of the Ninth Circuit, built upon Judge Walsh's ruling--that in the absence in the record of any finding by the trial court of manifest necessity, or any indication that the court considered the efficacy of alternatives, the tests of Perez have not been met--is plainly a mechanical formula. The two reviewing courts have judged the propriety of Judge Buchanan's declaration of mistrial, born in the unique situation of possible jury prejudice against both parties, by this mechanical formula: Judge Buchanan made no findings of a manifest need; and he left no indicators

on the record that he considered alternatives. Therefore, the absence of both demands the conclusion that there was no manifest necessity for the declaration. That is the sum and substance of the lower courts' review for abuse of judicial discretion. It is evidently immaterial to these courts that alternatives to mistrial were canvassed, were argued to Judge Buchanan, on no less than seven occasions prior to his mistrial declaration. [See App.285-291 for the context of these arguments.] These courts demand statements, by the trial judge,[22] on the

[22]Judge Walsh states in his hearing on October 2, 1975, that "alternatives were not even canvassed" [App.128-129], evidently not considering detailed argument for and against cautionary instructions by both counsel as "canvassing", and requiring instead that the trial judge himself make statements about the alternatives. Likewise, the Ninth Circuit in their Opinion found no "indications that the court considered the efficacy of alternatives, such as an appropriate cautionary instruction to the jury" [App. 30.]Since there were certainly indications in the record that counsel had argued this very alternative to mistrial, the inference is patent that the Ninth Circuit also requires that the indication be made by the trial judge.

record, that he considered alternatives to mistrial. The State argues that when counsel for both parties have been given ample opportunity to argue their position on the mistrial declaration, (unlike the Jorn circumstance) and included in that argument are alternatives to mistrial preferred by defense counsel, (again, unlike Jorn) and the government argues against these alternatives, (unlike Jorn), that the atmosphere of free and competitive debate has been attained, and that it can be presumed that the trial judge took these alternatives, as part of all the circumstances he had thus far observed, into consideration in his decision.

In essence these lower courts are saying that they can not infer that Judge Buchanan considered alternatives to mistrial from the fact counsel argued these alternatives to him. In the entire record before this court, there is nothing to indicate that Judge Buchanan was anything but totally attentive and responsive to the events going on in his courtroom, and to the arguments of counsel. The conclusion is manifest that he considered the argued alternative solutions to mistrial. The "indications", if

the Ninth Circuit is in need thereof, can be found in counsels' arguments, over a two-hour period, to Judge Buchanan.

An examination of the competing interests affected by Judge Buchanan's mistrial ruling,even considering Washington's "valued" right to go to this jury, yields the inescapable conclusion that the result reached in Somerville was correct and that its relatively permissive standards toward retrial should have been respected and followed by the District Court and the Ninth Circuit. The following is an assessment of its applicability to the actual events of the second trial of Washington.

Balancing The Interests By The Events at Trial

The Supreme Court, in its entire history of mistrial jurisprudence, has reversed two trial judges. Downum involved a particularly unpardonable fault of the prosecutor--unpreparedness. There can be no equating that situation with the one presented in Washington's second trial. From a reading of the trial transcripts, it is plain that Mr. Butler

was fully prepared to try the case. And Jorn concerned a trial problem for which the judge was at fault--his erratic, unpredictable, unconsidered mistrial declaration, where no search for alternative solutions was made. The Jorn opinion made clear that alternates would have made the mistrial unnecessary. Id., U.S. at 487, 91 S.Ct. at 558. More importantly, the circumstance of that case did not involve jury prejudice. There was needed in that case no judge's assessment of the heated atmosphere of trial. The impact on the jury was not at issue, and therefore any reasons for deference to the trial judge's discretion, other than the Perez acknowledgment, were insignificant compared to defendant's right to take his case to the original jury.

In essence, the Supreme Court has refused to sanction a mistrial ruling when trial events lent themselves to prosecutorial manipulation, and when erratic action by a trial judge is coupled with the absence of his considering alternatives to mistrial. This refusal has been followed in the Circuit Courts.

Neither situation matches, or even resembles, the facts of Washington's second trial. It is crucial to distinguish that the difficulty leading to mistrial in both Downum and Jorn originated with the government.[23] In Washington's case the difficulty--the improper statements--the jury prejudice--was caused by Washington's defense counsel.

Observing the changing tides that have marked mistrial jurisprudence from Gori to Somerville only serves to underscore the difficulty of identifying the relevant factors and specifying how they are to be weighed. The Ninth Circuit, relying on Jorn, settled on three relevant factors--the absence of findings, or any indication of considered alternatives, and the defendant's valued right to complete his case before that particular jury. From the foregoing syllabus of Supreme Court cases alone, it becomes

[23] Ergo Chief Justice Berger's warning that Jorn would have been examined differently had the defense brought about the mistrial declaration.

at once apparent that "findings" alone are not, and should not be, considered as indicia of whether or not there existed a manifest need to declare a mistrial, and have no place in the reviewing court's analysis of abuse of discretion.

The defendant's valued right to take his case to his chosen jury, while always a constant to be weighed in any circumstance of mistrial, has in this case been somewhat if not totally lessened by his own counsel's activities. It can not be said here that this factor was to be the fulcrum for Judge Buchanan's determination of manifest need for a mistrial.

The second factor, the absence of "any indication that the court considered the efficacy of alternatives", must be viewed in the context of the actual trial setting to determine the weight to be given thereto. As previously argued, the State believes that there exist abundant indications in the record that Judge Buchanan considered alternatives to mistrial because they were argued to him many times by counsel. From these

facts, which were before the Ninth Circuit, their observation must be taken to mean that the trial judge failed to place these indications on the record, which is true.[24]

Be that as it may, the scrupulous search for alternatives, which the Ninth Circuit seemed to require of Judge Buchanan, is not compelling in this case. It is not a Downum nor a Jorn case. This is not a case of prosecutorial misconduct or manipulation, or illness or unavailability of prosecution witnesses, or one of erratic, arbitrary judicial behavior. This is a case of possible jury prejudice, a case where the trial judge's assessment of the impact that prejudicial information has had on a jury should be inviolate. If he has decided to declare a mistrial, this decision should be paid deference,

[24]Judge Buchanan never voiced his consideration of alternatives to mistrial for the record. It should also be apparent from the record that Judge Buchanan is not a particularly chatty, or effusive judge.

unless it was the product of clear abuse.

There is no abuse, either clear or obscure, by Judge Buchanan's mistrial declaration. This warranty is founded on two grounds: One, that a trial judge should not, and is not, required by case law, to scrupulously search for all the alternative solutions to mistrial when confronted with possible jury prejudice (discussed infra), and two, the actual circumstances giving rise to the mistrial in Washington's second trial left no alternative for Judge Buchanan but to declare a mistrial. An examination of the record is validation enough for this statement.

There are few effective cures for jury prejudice. Judge Buchanan could have called in each juror separately and asked whether or not the statements made by Mr. Bolding to the jury had caused him or her to be prejudiced against the state to the extent an impartial consideration of the facts was no longer possible. However, Judge Buchanan and counsel had already inquired of several of the jurors, during individual voir dire, if they had any knowledge of the

reason for the new trial. [Exh.1.pp.24-54.] This alone must have sparked some inquisitiveness in those veniremens' minds. If Judge Buchanan were to once again call in the jurors, and ask each one about the extent of their prejudice, now that they knew the reason for the new trial, so much emphasis would have been placed upon this one issue which was not even properly before them (because the information was inadmissible, and untrue), that the taint, instead of being reduced, would probably have been more firmly entrenched in the minds of the jurors. While this alternative was not "canvassed", it is reasonable to assume Judge Buchanan, an experienced judge, and before that an experienced and distinguished attorney, considered this during argument and discarded it as ineffective.[25]

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[25]In Arizona, George Washington cannot legally be tried for murder by a jury of less than twelve persons. [See Art. 2, §23 of the Constitution of the State of Arizona, supra at page 12.] Therefore, a possible alternative that a juror, or jurors, be withdrawn because of their incurable prejudice, and Washington tried to a smaller jury, is not even available.

Another possible, but not reasonable, alternative cure would have been a cautionary instruction to the jury to disregard Mr. Bolding's vilifying statements concerning the prosecutor in the fist case. This alternative was in fact suggested to Judge Buchanan by Mr. McDonald, defense co-counsel, as a sufficient cure for the error. [App.288; and see 289 where Mr. Bolding suggests same.] And Judge Walsh suggested such instructions in his colloquy with Mr. Butler. [App. 128.] But this instruction, instead of effecting a cure, would also have served to emphasize the error.

It was noticed in United States v. Carter, 445 F.2d 669, 673 (D.C. Cir. 1971) by the District of Columbia Circuit, "[e]xperienced counsel frequently desire not to have a curative instruction which would focus the jury's attention" on remarks made by other counsel. Mr. Butler did not want a cautionary instruction to the jury[26] [see

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[26]Mr. Butler is an "experienced counsel" with six years involvement in criminal prosecutions.

App. 285-291.]-the jury's attention had already been "focused" on this issue of Washington's new trial. They had heard about it in Mr. Bolding's voir dire [Ex.1,p.22], they had been asked about it by Judge Buchanan in his voir dire, and had finally been told the story in Mr. Bolding's opening statement. Now, defense counsel wanted them to hear about it again through a cautionary instruction.[27]

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[27]The trial judge plainly could not be guided solely by the solutions proposed by defense counsel, since it was their error that created the possible juror bias against the State. They could have no real interest in "curing" the prejudice since it could only work to the defendant's benefit. On the other hand, the prosecutor is well situated to judge the impact of such statements on his position and his case. Some deference by the trial court to attention of his suggestions for cure is thereby justified.

Either by individual questioning by Judge Buchanan on the extent of their prejudice, or by a cautionary instruction, four times the jury would have been directed to bring their attention to this issue of prosecutorial misconduct. The issue itself, without undue emphasis, is highly inflammatory (contrary to Mr. McDonald's viewpoint [App.288]).No factcould possibly prejudice the State's position in the minds of the jury more than one of a prosecutor's misconduct, especially when the highest court in their State supposedly ruled for the defendant sitting before them because of this misconduct. Telling them, in any combination of words, to disregard this alleged misconduct would have been insufficient to cure the contamination. And what is of essential importance, and what Judge Buchanan could not have cor-

rected by any means,[28] was that this information that had reached the jury, irrespective of its evidentiary impropriety, WAS NOT TRUE. The Arizona Supreme Court did not say what Mr. Bolding said it did; there was no intentional suppression of evidence by Mr. Cooper in the first trial [See App. 37-53,]; and Mr. Cooper, himself an experienced criminal prosecutor, had certainly not been "taken off the case" for this alleged "hiding" of evidence. [See App. 201-202].

Not only does the record itself disclose that no alternative solutions existed to cure the taint in Washington's jury, Circuit Court and the Supreme Court do not require trial judges to indicate a search for alternatives in cases of jury prejudice. Their discretionary rulings are given wide latitude in this instance.

The only two Supreme Court cases to directly pass upon juror prejudice in a mistrial circumstance were Simmons and Thompson. As has been pointed up, supra, the Simmons trial judge did not canvass alternative solutions. Once he discerned the potentially prejudicial information (against the government) had reached the jury, he declared a mistrial. This was upheld by Mr. Justice Gray as a proper exercise of his power "to prevent the defeat of the ends of public justice." 142 U.S. at 154, 12 S.Ct. at 174 . Likewise, in Thompson there is not a hint of consideration to alternative solutions. A mistrial was declared once it came to the judge's attention that a juror had sat on the grand jury that indicted the defendant. In less direct consideration, while the issue was not jury prejudice, the Wade Supreme Court, recognizing it was a valid ground for mistrial, stated once the judge discovered possible jury prejudice it was his

[28] Judge Buchanan could not have instructed the jury that the statements made by Mr. Bolding were untrue because one, he did not know anything about what occurred prior to this trial [See App. 209 for statements to this effect], and two, Such an instruction would naturally have lowered the jury's esteem for Mr. Bolding and caused to be inserted in their minds a possible prejudice against George Washington.

duty to discharge the jury. No mention is made of a search for alternatives. [Wade, 336 U.S. at 689, 69 S.Ct. at 837.]

Respecting the current law, while the facts presented to the Somerville Court did not deal with jury prejudice, but rather state policy and procedure, the opinion itself deals with the circumstance in a manner that cannot be ignored. This Court cited Simmons and Thompson (juror bias) and Lovato (defective indictment) for the cases from which the Court could distill a general approach [quoted supra], "premised on the 'public justice' policy of Perez" [410 U.S. at 464]. This Supreme Court did not include the words, in its general approach that a mistrial is proper if an impartial verdict cannot be reached, "and alternatives to mistrial were considered." Given the Court's decision in Jorn two years prior, it is not easy to dismiss a literal reading of the general approach as an unintended one. The State believes the Supreme Court did not ever intend,[29] in a trial atmos-

[29] Given the cases of Simmons, Thompson, Wade and Somerville.

phere of possible jury prejudice, that before a mistrial ruling is upheld on appeal a trial judge must have exercised his judicial discretion by a "scrupulous" search for alternative solutions. The requirement this Court enforced in Jorn, that judges not foreclose the defendant's option [to take his case to the original jury] until a scrupulous exercise of judicial discretion is fulfilled, has no application to the issue of jury prejudice. The Ninth Circuit's evident search for caution and urgent circumstances and indications of considered alternatives should be replaced with a deference, except in the clearest cases of abuse, which this is not, to the trial judge's discretion.

The response of the lower courts has echoed adherence to this standard. In United States v. Chase (United States v. Parrish, United States v. Roy), 372 F.2d 453 (4th Cir. 1967) it was brought to the trial court's attention that the jurors had all read one newspaper article, and upon a poll, nine of them had read another article. Without inquiring of the jurors whether or not

they could still decide the case fairly, and without asking counsel what they wanted to do,[30] the judge declared a mistrial. The Fourth Circuit, "on this record" [372 F.2d at 466], could not find an abuse of discretion. It is important to note that this case involved several defendants, some being tried to the jury, and some to the judge. The affirmance that double jeopardy did not attach to the jury defendants was reached immediately, and with little trouble for Roy, a non-jury defendant. The Court stressed, (the Framers' familiar guidepost) "there is not the slightest suggestion that the convenience or benefit of the government was sought to be served." Id.

The Fourth Circuit then decided the companion case of United States v. Smith, 390 F.2d 420 (4th Cir. 1968).

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[30]The trial judge stated: "Now, what does [sic] the defendants want to do that did not have a jury trial? Well, I am not even going to ask you. I am going to declare a mistrial on it. . ." [372 F.2d at 464].

Smith was a co-defendant of Roy's.[See United States v. Chase, supra]. The Court held the circumstances indistinguishable, although Smith's charges had been dismissed in court. The Circuit Court recognized that the Supreme Court was capable of close scrutiny of each mistrial circumstance to see whether with reference to the particular facts there has been oppression and harassment, [referring to Downum,] but saw none in this case.

". . .the Fifth Amendment as interpreted by the United States Supreme Court from [Perez] to United States v. Tateo [citations omitted] was meant to prevent oppressive exercise of the government's power to prosecute." Id., at 422-423.

In 1972, in full awareness of the Supreme Court's decision in Jorn, the Fifth Circuit decided United States v. Pridgeon, 462 F.2d 1094 (5th Cir. 1972). Pridgeon's witnesses, wife, and daughter-in-law, had been seen talking to a juror. Based upon this knowledge the trial judge declared a mistrial, and no alternative solutions were "canvassed". The Fifth Circuit had no trouble with rejecting Pridgeon's claim of double jeopardy.

> "It is the trial judge who must first assess the effect of any alleged misconduct on the overall fairness of the trial. . ." 462 F.2d at 1095.

While defense counsel had told the judge the conversations were about mundane matters, totally unrelated to the trial,

> "The trial judge had no way of ascertaining the true content of conversations that took place in violation of his express order. In addition, the juror may have developed some subtle emotional inclination toward the defendant from her conversations. . .It goes without saying that the prosecution, just as the defense, is entitled to a fair trial. . .

Pridgeon asserts that the trial judge also abused his discretion because he could have adopted one of the less drastic alternatives to a mistrial, for example F.R. Crim. Pro. 23(b). While it is true that there are alternatives to

> a mistrial, we cannot say under the circumstances of this case, taking into account the Government's objections, that the trial judge abused his discretion by not adopting one of the alternatives." Id.

Under the circumstances of Washington's case, which are strikingly similar to Pridgeon's, the Ninth Circuit was in error to rule that Judge Buchanan had abused his discretion in declaring the mistrial.

Here, the Fifth Circuit relied primarily on Perez, Thompson, and Gori and concluded:

> "Moreover, in the instant case it is the indiscretions of defendant's witnesses [emphasis in the opinion] and relatives that reasonably prompted the trial judge's concern regarding the fairness of the first trial. [Downum]. We cannot say that a single incorrect date on an indictment, an empanelled jury, and one-half day of testimony amount to a deprivation of Pridgeon's con-

stitutional rights by allegedly placing him in double jeopardy."

Id., at 1096.

The exact same statement can be said for Washington.

The Fourth Circuit was also given the opportunity to apply Jorn to an instance of jury prejudice when the trial judge did not consider alternatives prior to his mistrial declaration, and unequivocably chose to reject it in Whitfield v. Warden of the Maryland House of Correction, 986 F.2d 1118 (4th Cir. 1973). Defense counsel was making argument for acquittal before the trial judge when one of the jurors walked through the courtroom. The judge was not sure whether or not the juror had "heard anything" and suggested he be asked. Defense counsel objected and a mistrial was then declared. The opinion of the Court, in affirming the mistrial, begins with reliance on Perez and ends with Somerville. But what is reasoned in between is of paramount importance to the case at bar:

"Obviously, there was no manifest necessity in the sense

that it was clearly evident that mistrial was unavoidable, as it is, for example, when the jury is unable to agree or a juror becomes incapacitated. [citations omitted.] But the [Supreme] Court has never held that the Perez doctrine of manifest necessity implies an absolute need. Instead, it has read the requirement of manifest necessity in the light of the Perez concept of public justice. [Somerville.]

Perez's public justice policy embraces two components, "a defendant's valued right to have his trial completed by a particular tribunal." and "the public's interest in fair trials designed to end in just judgments." Ideally, these elements co-exist, but in some instances the first must be subordinated to the second. [Wade.] Expounding this theme, dictum in the Court's most recent interpretation of the

double jeopardy clause notes that the public justice policy of Perez is served by a mistrial when the jury cannot return an impartial verdict. [Somerville.] Whitfield relies primarily on [Jorn]. . .While Jorn is instructive, we think it is not controlling. Time and again, the Court has refused to formulate rigid rules governing the application of the double jeopardy clause, and it has pointed out that the cases generally turn on their particular facts.

[See [Jorn, Downum, Wade].]

These cases illustrate that the Court's discussion of the Perez standard cannot be wrested from its factual context. Thus, the [Jorn] Court's ruling with respect to alternatives to mistrial when a judge perceives that witnesses have not been adequately cautioned cannot be applied literally to the problem confronting a tri-

al judge who fears that a juror has been exposed to improper influences.

The cases in which mistrials have been declared because of suspected juror bias support the conclusion that Whitfield's reliance on Jorn is misplaced. [Simmons, Thompson, United States v. Chase, United States v. Smith.] In each of these cases, after the jury had been impaneled and sworn, the trial judge received information which rendered suspect the ability of one or more of the jurors to reach an impartial verdict. The exercise of the trial judge's discretion in declaring a mistrial was upheld, and reprosecution was permitted over objections based on the double jeopardy clause. Significantly, in each case, after the trial judge had ascertained that a juror had received an improper communication, the reviewing court did not require the judge to de-

> termine whether the communication had in fact prejudiced the juror. Discovery of the harmful communication in itself afforded grounds for mistrial." Id. at 1122 and 1123.

The Court pointed out that "[t]he trial judge did not act sua sponte, before he declared a mistrial, that he sought the views of counsel for both defendants (exactly as had Judge Buchanan). Id. Their final conclusion rested on the trial judge's discretion exercised in an atmosphere of possible jury prejudice.[31]

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[31]The trial judge wrote an opinion after he declared the mistrial. The Fourth Circuit Court evaluated his discretion from the opinion and "the transcript of the trial proceeding." 486 F.2d at 1122. It is relevant, in the context of Judge Walsh's ruling, that although the trial judge stated that his sole interest was to protect the interest of the defendant, this was "[a]t the outset [was] put aside", and "accorded little or no weight" by the Circuit Court. As the State has stressed in the foregoing analysis, and as this Fourth Circuit Court affirms, "findings" and "statements" of a trial judge as to his reasons for a mistrial are completely irrelevant and transparent to whether or not he abused his discretion--it is the trial record which tells the story for the reviewing court.

> "As the cases dealing with the problem of juror disqualification indicate, a trial judge need not explore whether the extraneous communication has in fact prejudiced the juror. When a judge concludes that on the basis of facts and reasonable inferences to be drawn from the facts that a juror has been exposed to information that might taint his verdict, he may withdraw the juror in the exercise of his sound discretion without unconstitutionally subjecting the defendant to double jeopardy.
> [Simmons.]"
> Id.

To the same effect is United States v. Hewitt, 517 F.2d 993 (3rd Cir. 1975) where the defendant had relied on Jorn in a trial atmosphere of possible juror bias which he himself had created, and where his confrontation with his murder charge had spanned 14 years. The Court recognized that this defendant's right to conclude once and for all, his

confrontment of society through the verdict of tribunal he might believe to be favorably disposed to his fate was particularly important, but nonetheless was "not persuaded to say that this scrupulous exercise of discretion mandated in Jorn requires in every instance a thorough examination of the jurors and consideration of the alternatives to discharge, such as a continuance. We believe that the exercise of discretion by the trial judge may in fact be based, in particularly compelling cases, solely on a common sense assessment of the possibility of that a certain factual situation may jeopardize the ends of public justice". 517 F.2d at 996. Accord, United States v. Barclift, 514 F.2d 1073, 1074, (9th Cir. 1975); and Parker v. United States, 507 F.2d 587, 589 (8th Cir. 1974), cert. denied, 95 S.Ct. 1576 (1975), where "[n]either the prosecutor nor the court was to blame for the [prejudicial radio broadcast." See also United States v. Walden, 448 F.2d 925 (4th Cir. 1971) where the Circuit Court applied Jorn to circumstances of possible juror preju-

dice where no alternatives were considered by the trial judge, and then on rehearing, reversed itself on that basis. 458 F.2d 36 (4th Cir. 1972).

The approach is the same today as it has always been. Nevertheless, the Ninth Circuit has chosen to disregard the Supreme Court's long-standing observance in Simmons, Thompson, Wade, and Somerville; chosen to ignore the opinions and rationale of its sister courts in the Third, Fourth, Fifth, and Eighth Circuits. It is evident from the record of Washington's second trial that the concern of Judge Buchanan was to secure for both parties a fair trial before an impartial jury unaffected by whatever reaction, conscious or unconscious, Mr. Bolding's remarks about the Arizona Supreme Court's holding of prosecutorial misconduct might have engendered in their minds. The Simmons holding echoed loudly in the portals of Judge Buchanan's courtroom:

> "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice can-

not be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection. . ."
142 U.S. at 148, 12 S.Ct. at 171.

The circumstances of possible jury prejudice to both parties, which confronted Judge Buchanan after Mr. Bolding's voir dire and opening statement, were sufficiently extraordinary and striking to accord him some reasonable discretion in how to proceed fairly to all concerned. To have alloweed that trial to continue would have resulted in a dual trial of the State of Arizona and Washington. Such a circumstance would surely confound and distract the jury. The end result would be a trial to a jury that was confused and prejudiced, with its attention directed from the real issue and focused upon the disentanglement of the collateral, improperly inserted issues of whether the State really was guilty of purposefully hiding evidence from George Washington at the last trial. Judge Buchanan did not abuse his discretion when he chose the only

reasonable alternative to this otherwise inevitable outcome. The accorded interest of Washington, to have this jury decide his guilt or innocence, had been justly overridden by the public's interest in fair and impartial tribunals to pronounce a just judgment. To uphold the Ninth Circuit's judgment, which tilted the scale the other way, will be to withhold the right accorded the State to a fair and impartial jury.

Defense Counsel's Precipitation of Mistrial

It is the State's position that where a defendant actively engages in a course of conduct calculated to necessitate the granting of a mistrial, who does not actually request a mistrial but provokes the State to request a mistrial, defendant is barred from relying on the Fifth Amendment right to be free from double jeopardy. Washington, through the bad faith conduct of his counsel, cannot bait the Court and the prosecutor into a mistrial ruling and then hop under the Constitution for protection.

This principle is not new to this Court. In 1976, United States v. Dinitz

424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed. 2d 267 (1976), decided upon the issue of consent, became the vehicle for this Court to stress its distaste for this chicanery. This court noted the "improper" conduct of defense counsel, and no mention was made, as was made by the Ninth Circuit [App. 31] that the trial judge failed to find it was also prejudicial. The impropriety was not only that it tended to prejudice the other side, but that evidence not capable of proof was addressed to the jury. Because there was no overreaching or bad faith on the part of the government (reversing the Fifth Circuit's Jorn-ian holding), and because the defendant was not prejudiced by retrial, and because it was defense counsel who interjected the error, double jeopardy did not obtain.

Chief Justice Warren Burger's concurring opinion seems to foretell the state of events in Washington's second trial. Underpinning the opinion is the corresponding right of the State to a fundamentally fair trail, as well as the severity of such an impropriety.

"I add an observation only to emphasize what is plainly

implicit in the opinion, i.e. a trial judge's plenary control of the conduct of counsel particularly in relation to addressing the jury. An opening statement has a narrow purpose and scope. It is to state what evidence will be presented. . .it is not an occasion for argument. To make statement which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict. A trial judge is under a duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop such profession-

al misconduct. Here the misconduct of the attorney, Wagner, was not only unprofessional per se but contemptuous in that he defied the court's explicit order.

Far from 'overreacting' to the misconduct of Wagner, in my view, the trial judge exercised great restraint in not citing Wagner for contempt then and there." 44 L.Ed. 2d at 276-277.

The State wonders what Chief Justice Berger would think of the conduct exemplified by Washington's counsel, who also told the jury something he could not prove--not only because the Arizona Supreme Court Memorandum Opinion was wholly inadmissible, but because the opinion does not state or even imply the County Attorney was guilty of misconduct in purposely withholding and hiding evidence from Washington at his first trial. [See App. 7-15 and 35.] Washington's counsel falsely explained the holding of the Arizona Supreme Court Memorandum Opinion the jury to make them distrust the "County Attorney", to make them wary of the case the "County Attorney" presents

to them. Defense counsel had a copy of the memorandum opinion [see App. 205-206, where defense counsel placed the opinion on Judge Buchanan's bench]. He knew its contents. He knew the opinion did not even allude to misconduct of a County Attorney.

Such activity is the quintessence of impropriety. Because of this impropriety, which was aimed at outraging the jury against the State, Judge Buchanan declared a mistrial. Under the doctrine of necessity, misbehavior of defense counsel that intrudes on a fair trial permits retrial. Couple this with the absence of any governmental overreaching, and the care and deliberation that Judge Buchanan gave to Mr. Butler's request for a mistrial and to defense counsel's arguments, the only conclusion is that the Ninth Circuit and the District Court should be

REVERSED.

CONCLUSION

The State's arguments have presented to this Court the picture of an able trial judge faced with the dilemma of conflicting constitutional mandates: The right to an impartial jury guaranteed by the Sixth Amendment versus the Double Jeopardy Clause of the Fifth Amendment. The State has shown that Judge Buchanan solved the problem well within his discretion, and that he acted with commendable fairness and with an eye to the best interests of both the defendant and the State. In Judge Buchanan's courtroom, defense strategems in violation of the rules of evidence and the sanctity of an impartial jury, leading to the introduction of highly prejudicial evidence not capable of proof, were not tolerated.

The State very respectfully requests the Supreme Court of the United States to reverse the decision of the Ninth Circuit on this issue, and to hold that George Washington, Jr. is not in custody in violation of the Fifth Amendment's proscription against double jeopardy.

This Petitioner's Brief is respectfully submitted this 20th day of June, 1977.

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I, VICTORIA A. KING, hereby certify that I have served a copy of the foregoing Petitioner's Brief upon Respondent George Washington, Jr., by delivering a copy of the same in the United States Mail, with postage prepaid, addressed to Edward P. Bolding, Esq., La Placita Village, Suite 402 Toluca Building, P.O. Box 70, Tucson, Arizona 85702, attorney for Respondent, this 19th day of June, 1977.

Victoria A. King
VICTORIA A. KING

SUBSCRIBED AND SWORN to before me this 19th day of June, 1977, by VICTORIA A. KING.

Dorothy P. Hillgrove
Notary Public

My Commission Expires:
6-16-78